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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 DORIS TSE,

4 Plaintiff,

5 v.

10 Civ. 7207 (DAB)

6 NEW YORK UNIVERSITY,

7 Defendant.

8 -----x

9 June 15, 2016
11:11 a.m.

10 Before:

11 HON. DEBORAH A. BATTIS,

12 District Judge

13 APPEARANCES

14 DORIS TSE, Pro Se

15 CERASIA & DEL REY-CONE, LLP
Attorneys for Defendant

16 BY: EDWARD CERASIA, II
- and -

17 DANIEL T. DREISEN, in-house counsel, New York University

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(Trial resumed)

THE COURT: Dr. Tse?

MS. TSE: May we approach? I can speak from here, of course.

I had success finding the documents that you asked for yesterday and I would like to bring them to the bench. They're labeled Exhibit 43 and 44 and I would be using them to question the witness, Dr. Abramson, but I would like to know if we can admit them into evidence.

THE COURT: Okay.

Have you shown it to Mr. Cerasia?

MS. TSE: Yes. I provided him with a copy.

THE COURT: Mr. Cerasia, do you have objections to admissions of documents 43 and 44 -- Plaintiff's Exhibit 43 and 44.

MR. CERASIA: I do not with respect to Exhibit 43. 44 I just haven't seen before so I guess it is subject to authentication. It was not involved in discovery in the case.

MS. TSE: No.

MR. CERASIA: But, your Honor, these revolve around the faculty handbook and, as I told Dr. Tse when she came in, that leave of absence policy applies to all faculty so it is not an issue in dispute. So, maybe it can speed things along. That was 22C that your Honor had received, subject to connection. So, I wanted to let you know that.

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1 THE COURT: Is that also true of 10, which I received
2 subject to connection?

3 MS. TSE: Yes, most definitely.

4 MR. CERASIA: Well, Dr. Abramson will testify about
5 Exhibit 10.

6 THE COURT: So, we will say that at this point
7 Plaintiff's Exhibit 22C is received in evidence full, no longer
8 subject to connection.

9 MS. TSE: And if I may provide some information on
10 Exhibit 44, I found this in the archives of my computer, it
11 dates back to 2008 and it was not disclosed during discovery
12 but it does have some very revealing information on what is
13 considered a non-tenure track full-time faculty, of which I was
14 a member.

15 THE COURT: All right. So, let's -- I guess we are
16 ready to proceed then. Is it Mr. Abramson or Dr. Abramson?

17 MR. CERASIA: Dr. Abramson. May I go get him, your
18 Honor?

19 MS. TSE: May we bring these to the bench when
20 Mr. Cerasia --

21 THE COURT: Why don't we hold off until you are going
22 to use them. Are you going to use them with Dr. Abramson?

23 MS. TSE: No, I'm not going to use that.

24 THE COURT: Let's hold off because I want to get
25 Dr. Abramson in and out because of his schedule. They have

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1 been received in evidence. 43 is in and we are still waiting
2 for Mr. Cerasia to have a chance to look at 44; is that
3 correct?

4 MR. CERASIA: Yes. Did you say you will show 44 to
5 Dr. Abramson?

6 MS. TSE: No, I won't be showing either 43 or 44.

7 THE COURT: 43 is in, 44 is not.

8 (Plaintiff's Exhibit 43 received in evidence)

9 STEVEN ABRAMSON,

10 called as a witness by the Plaintiff,

11 having been duly sworn, testified as follows:

12 THE COURT: Would you state your full name and spell
13 both your names for the record.

14 THE WITNESS: S-T-E-V-E-N A-B-R-A-M-S-O-N.

15 THE COURT: Thank you.

16 You may proceed, Dr. Tse.

17 DIRECT EXAMINATION

18 BY MS. TSE:

19 Q. Good morning, Dr. Abramson. Before I start, I would just
20 like to apologize to your Honor and everyone for the delay.

21 Dr. Abramson, you may already know, Doris Tse, a
22 former associate research professor in the Department of
23 Medicine is the plaintiff in this suit. Since you were not
24 involved with Dr. Tse's termination we are hoping that you can
25 provide the Court with impartial statements on the issues under

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1 consideration today.

2 Have you testified in court before?

3 A. Yes, I have.

4 Q. Now, most of my questions will be yes or no. You will be
5 presented with exhibits. When you need more time to look them
6 over, please, let me know.

7 A. Okay.

8 Q. Dr. Abramson, what is your position at the NYU Langone
9 Medical Center?

10 A. I have two positions: One, I am the Vice Dean for
11 Education, Faculty and Academic Affairs, and for the last three
12 years I have been Chairman of Medicine.

13 Q. Please describe for the Court your responsibilities as the
14 Vice Dean for Education, Faculty and Academic Affairs?

15 A. So, for the education piece it is oversight for medical
16 student residency and graduate medical education. For faculty
17 affairs it is promotions, appointments, issues relating to
18 faculty grievances.

19 Q. Thank you.

20 After you replaced Dr. Blaser as the chair for the
21 Department of Medicine, are they any different or pretty much
22 the same?

23 A. Differences in the department?

24 Q. Yes; as the chair of the Department of Medicine.

25 A. We have built upon what Marty had started so its

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1 continuation and growth.

2 MS. TSE: May we approach, your Honor?

3 THE COURT: You may.

4 Q. Exhibit 13 has been admitted into evidence. Please
5 confirm, as Exhibit 13 shows, that your office is aware that
6 certain members of the NYU faculty may fall into the protected
7 class, meaning that they could be targets of discrimination.

8 MR. CERASIA: Objection.

9 THE COURT: Yes. Sustained as to form.

10 Are you going to ask him a specific question about
11 this document?

12 MS. TSE: All right, I will rephrase.

13 Q. Can you explain to the Court what you mean, since it is a
14 notice that you sent to department chairs, that
15 non-appointment, however, cannot be based on unlawfully
16 discriminatory factors?

17 A. So, we send this every year because people who are
18 non-tenured serve at-will and can be not reappointed. We are
19 very careful to make sure that the chairs are making the
20 decisions to not reappoint based on the merit, the performance,
21 the funding of the individual faculty member. We always want
22 to be sure that there is no reason that a person is being let
23 go except for underperformance, meaning discrimination of any
24 kind.

25 Q. Thank you.

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1 May we approach, your Honor?

2 THE COURT: You may.

3 Q. Exhibit 24 is a letter from Dr. Bruce Solitar who is -- who
4 was and still is Dr. Tse's rheumatologist. He is a clinical
5 associate professor in the Department of Medicine; is that
6 right?

7 A. Yes. As chair of rheumatology in the past I trained
8 Dr. Solitar as a young rheumatologist.

9 Q. Thank you.

10 Now, Exhibit 24 is a letter that Dr. Solitar sent to
11 Dr. Odom who, at the time, was VP of Employment and Labor
12 Relations.

13 Please, if you can comment on the underlined text?

14 A. Sure.

15 So, Dr. Solitar has made a diagnosis of systemic lupus
16 erythematosus, E-R-Y-T-H-E-M-A-T-O-S-U-S, and a diagnosis as
17 well of osteoarthritis involving the hands.

18 Anything -- what else would you like?

19 Q. I'm sorry. Do you agree that NYU was duly informed in that
20 Dr. Tse was a qualified individual under the Americans with
21 Disabilities Act?

22 MR. CERASIA: Objection.

23 THE COURT: That's calling for a legal conclusion so I
24 will sustain the objection as to form. You may ask what his
25 understanding of this letter is.

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1 Q. All right. I will rephrase.

2 Looking at this letter, would you agree that Dr. Tse
3 would fall into your description on non-reappointment based on
4 unlawfully discriminatory factors or she has the potential to
5 be -- to not have her appointment --

6 THE COURT: This is getting too confusing and it is
7 not going where I think it will be unobjectionable. So, what
8 is it that you really want to ask Dr. Abramson about this
9 letter?

10 MS. TSE: Whether Dr. Tse would be viewed by his
11 office, in particular, and NYU, in general, as a disabled
12 individual.

13 THE COURT: Great question.

14 THE WITNESS: I wouldn't read it that way. It says
15 that Dr. Tse is able to work, may have some difficulty doing
16 specific work.

17 Q. Very well.

18 And given that Dr. Tse had difficulty doing particular
19 work, would you agree that if she was provided reasonable
20 accommodations to offset her medical impairments, she would be
21 able to meet her job expectations as an associate research
22 professor?

23 MR. CERASIA: Objection.

24 THE COURT: Sustained as to form.

25 Q. All right. Let me try harder not to make things

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1 complicated.

2 THE COURT: Let me ask a question, Dr. Abramson.

3 Dr. Abramson, in your opinion, based on this diagnosis
4 by Dr. Solitar, would Dr. Tse qualify for an accommodation?

5 THE WITNESS: I think based on this what the
6 supervising investigator would do would be to meet with
7 Dr. Tse, look at the things that can be done and which can't be
8 done. That's what I would do. I don't know that it frankly
9 means that additional help must be provided by the person who
10 you are working with but it certainly would involve a
11 discussion. I would sit down with Dr. Tse and say, okay, what
12 can you do, what can't you do. Let's see if we can map out
13 some experimentations or collaborations to allow you to
14 continue to work. But I don't think it would trigger, well, I
15 must hire somebody else to assist Dr. Tse which is a different
16 discussion.

17 THE COURT: Well, let's continue on in that. What
18 would -- why do you say that's a different discussion?

19 THE WITNESS: Well, I would look to see how Dr. Tse
20 could do work in the laboratory but I wouldn't feel that it
21 would be then my obligation to say that piece that you don't,
22 you are not able to do, I must hire a third person or a second
23 person to assist you. My advice might be let's find some other
24 scientist to work with you, let's do collaborations, especially
25 if a person doesn't have their own grants. What we really try

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1 and do is find discussions with other doctors, other scientists
2 who could allow that other person to work as part of a team,
3 collaborative team.

4 So, I would try and find a solution but I wouldn't
5 necessarily say that I had the obligation to hire another
6 person to assist at the bench.

7 THE COURT: Would you consider hiring another person
8 to assist in the lab?

9 THE WITNESS: Only if I, as the leader of the lab,
10 felt that there was a collaborative project that either I was
11 interested in proceeding with or with someone else in the
12 laboratory was.

13 So, what happens if someone has no funding, the chair
14 really is in a position to decide is the value of what they're
15 doing worth an additional investment for the project that you
16 can do together, either for me if I am your direct
17 supervisor -- the person's direct supervisor -- or in the
18 department if there are other people. But, at the end of the
19 day, it has to be in the setting of how valuable I view that
20 work is to invest more dollars into it to see the science go
21 forward.

22 THE COURT: Thank you.

23 MS. TSE: May I proceed, your Honor?

24 THE COURT: You may, Dr. Tse.

25 BY MS. TSE:

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1 Q. We will be presenting you with exhibits to further explore
2 the points that you have just made.

3 A. Okay.

4 Q. Now, before we go into that, I would like --

5 THE COURT: Let's just wait one second.

6 THE WITNESS: Yes.

7 THE COURT: Please, take your time.

8 THE WITNESS: Okay. Thank you.

9 BY MS. TSE:

10 Q. Before I go into that, let me present to the Court that
11 Dr. Abramson is an internationally recognized rheumatologist
12 and he has extensive expertise in basic science and clinical
13 research and he, I am sure, without a shadow of a doubt, that
14 he is totally familiar with the grant application process.

15 A. Yes.

16 Q. Am I right about that?

17 A. That's correct.

18 Q. Thank you.

19 May we approach, your Honor?

20 THE COURT: You may.

21 Q. Exhibit 10 is NYU's policy on Performance Expectation for
22 Research Faculty. Please confirm that that was issued by your
23 office?

24 A. That's correct.

25 Q. Now, as a member of the research faculty, Dr. Tse was

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1 expected to acquire enough extramural funding to support 60
2 percent of her salary in 2010; is that right?

3 A. That is --

4 MR. CERASIA: Objection.

5 A. -- I'm not sure correct because I don't -- I have to look
6 back at when 60 percent became the benchmark. I would point
7 out that the benchmark is a floor and not a ceiling and that
8 whether it was 55 in 2010 or 60. I would have to look back.

9 I should say that I led the committee that drafted
10 these recommendations and got it approved by the faculty
11 council so I am very, very much familiar with the development
12 of the document and its intentions.

13 Q. Please take your time to read through the policy because I
14 believe that there is a section there that stipulated 60
15 percent and as soon as I find out where that is --

16 THE COURT: It is NYU 03084.

17 A. I see it on the third page.

18 Q. Thank you.

19 So, just to reiterate, it would be 60 percent of total
20 compensation for that year?

21 A. Yes, but I think the rest of that paragraph is extremely
22 important. When I said that 60 percent was a floor, it then
23 goes on to say, and the intent was, that it may be higher
24 depending on the individual department. So, it says:
25 Promulgated departmental policies. So, in fact, within an

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1 individual department the chair has the ability to set the bar
2 higher. When we implemented this it was an attempt to create a
3 floor for faculty but not a ceiling and that was left to
4 departmental chair discretion to make that value higher.

5 Q. And I am now referring to Section D, letters to faculty
6 that the members of the research faculty --

7 THE COURT: Wait. What Bates stamp page is that?

8 MS. TSE: That's NYU 003087.

9 THE COURT: Thank you.

10 MS. TSE: Towards the top, Section D.

11 Q. And the instructions there were for the department chairs
12 stating that chairs will send a letter of responsibilities to
13 each faculty member annually informing each faculty member of
14 his or her performance over the past academic year as well as
15 expectations for the coming year.

16 Is that how it is supposed to go?

17 A. That's correct.

18 MS. TSE: Give me a second?

19 THE COURT: Certainly.

20 MS. TSE: May we approach, your Honor?

21 THE COURT: You may.

22 MS. TSE: Do you have Exhibit 13?

23 THE WITNESS: Which one?

24 MS. TSE: Do you have Exhibit 13?

25 THE WITNESS: I do. This is the letter.

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1 MS. TSE: I'm sorry, I am really -- that's why he
2 doesn't have it. Okay. I should be able to find it. That
3 would be Exhibit 9. I apologize to everybody for the fumbling.

4 THE COURT: While we are waiting, Dr. Abramson, in
5 terms of exhibits Plaintiff's Exhibit 10, am I correct that
6 this applied to all faculty, tenured and nontenured?

7 THE WITNESS: With caveats. This document was written
8 primarily for tenured faculty.

9 THE COURT: It may have been written for tenured
10 faculty. What I am trying to get out of you is is there
11 anything within that document that suggests that parts of it do
12 not apply to someone in Dr. Tse' position?

13 THE WITNESS: In this case it is on B1, which I
14 alluded to, wherein we say that a chair may set a bar higher
15 than the 60 percent.

16 THE COURT: Are you talking about --

17 MS. TSE: Exhibit 10, it is B, Required Extramural
18 Funding -- REF.

19 THE COURT: Bear with me. What page is this?

20 THE WITNESS: 3084.

21 THE COURT: All right. The chair --

22 THE WITNESS: Again, the issue is that the 60 percent
23 is a floor requirement but a chair may set it higher. And we
24 put that in place particularly for non-tenured faculty because
25 the non-tenured faculty are faculty at-will and the chair has

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1 to make a decision, depending on their ability to get
2 extramural funding or be collaborative scientists with other
3 funded scientists, how much that person needs to bring in on
4 their own with regard to the extramural funding requirement.

5 BY MS. TSE:

6 Q. But -- or and, pertaining to that, the chair is expected to
7 send letters notifying the individual research faculty member
8 where he or she stands as far as REF expectations are
9 concerned; is that right?

10 A. That's generally true, unless there are other circumstances
11 that would lead the chair to take a different approach.

12 Q. All right. Let's then get to Exhibit 8.

13 A. 8? I have 9, that is the last one.

14 Q. That would be -- oh, did you get 9? I'm sorry.

15 May we approach the bench again, your Honor?

16 THE COURT: You certainly may, Dr. Tse.

17 Q. While we are waiting, Exhibit 8 is a letter that Dr. Blaser
18 sent Dr. Tse on 2009 specifically addressing the issue that we
19 just discussed, by that I mean covered under Section D of
20 Exhibit 10, letters to faculty.

21 A. Yes.

22 Q. And if you can focus on the two underlined areas on page 2,
23 does that show that Dr. Tse achieved 100 percent of her REF for
24 that particular year which ended with academic year August
25 31st, 2009?

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1 A. Yes, it does.

2 Q. And may I direct your attention to the first page, third
3 paragraph? I am referring to the second sentence and, with the
4 Court's permission, I would like to read it so we are all going
5 to be on the same line: Each full-time faculty member in the
6 clinical departments is expected to have achieved extramural
7 funding support for at least 50 percent of the portion of his
8 or her salary allocated to conduct research as of September
9 2008 and continuing thereafter in accordance with increasing
10 percentages for subsequent years.

11 So, Dr. Tse, upon receiving this letter, was
12 instructed that she needed to achieve a minimum of 50 percent
13 for previous academic year and subsequent increases afterwards;
14 is that correct?

15 A. Yes.

16 Q. And according then to Exhibit 10, the expectation for her
17 for the subsequent year would be 60 percent?

18 A. Or more. 60 is the floor.

19 Q. Can you please point out to the Court where that is so
20 stipulated?

21 A. Well, it is the continued use of the word "minimum." That
22 you must cover at least 60 percent. And again, that language
23 is intentional because we have many faculty who cover 80
24 percent, 90 percent, or 100 percent, and those people are
25 continued to cover that much of their salary. If a person

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1 begins to decline in their productivity and they fall below
2 what they're currently funding, 80, 90 -- you were covering 100
3 percent -- if it falls below 60 percent people become subject
4 to some negative outcome and negative outcomes can include
5 salary reductions, or in the case of non-tenured faculty,
6 non-reappointment.

7 Q. Thank you.

8 You are or have been a member of study sections at the
9 NIH?

10 A. Yes.

11 Q. Please explain to the Court how this system works.

12 A. Well, the study section is the model by which grant
13 applications to the NIH are reviewed and it is a peer-review
14 model. People with expertise in the field, usually 20, 25
15 people, may read 80 grants twice a year. Those grants are
16 divided among the several -- the 20 or 25 scientists and then
17 are presented over a two to three-day period and ranked. And,
18 depending on the rank, grants will be funded or not funded.

19 MS. TSE: Your Honor, is that pretty clear to you in
20 particular, how --

21 THE COURT: Let me reabsorb this.

22 And this is reviewed by NIH?

23 THE WITNESS: So, the NIH selects scientists that they
24 bring to Bethesda and the scientist spends two days -- the NIH
25 runs two programs so they're staffing it and they assure the

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1 quality control and what not, but it is the scientists from
2 around the country, each of whom they have been assigned 10
3 applications, and two or three people present those
4 applications to the group of 25 for discussion and then they
5 are rated for quality.

6 THE COURT: But this is for NIH's selection.

7 THE WITNESS: So, that's how NIH does it but most
8 large funding agencies, typically foundations, Heart
9 Association, have a similar model, it is called -- it is a
10 peer-review model.

11 THE COURT: So this is what an individual applying for
12 a grant has to go through?

13 THE WITNESS: That's right.

14 THE COURT: Thank you.

15 BY MS. TSE:

16 Q. And please confirm for the Court that if there is any
17 conflict of interest, the reviewer is expected to recuse
18 himself or herself?

19 A. That's correct. And the NIH is very, very attentive to
20 that and will recuse scientists who have any relationship at
21 all with the applicant.

22 Q. So that's a guarantee that the reviews are impartial?

23 A. That is the goal, that they're impartial.

24 Q. Thank you.

25 Your Honor, Exhibit 31 is what is known as a summary

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1 statement which is a review by such an NIH panel pertaining to
2 Dr. Tse's application. I know you do not want to get into the
3 CFAR flow cytometry core grant application but this is the
4 closest thing that plaintiff can provide as far as an impartial
5 assessment of her capabilities to apply for grants and meet the
6 school's REF.

7 THE COURT: Mr. Cerasia, do you have anything to say?

8 MR. CERASIA: I do. I object, your Honor. The date
9 of the release of this is December 14, 2009 and this is an
10 application or funding proposal by Dr. Valentine and this would
11 relate to the time that Dr. Tse was part of the core as the
12 core director, and your Honor has already excluded from this
13 trial -- funding relating to her as a core director. So, I
14 don't see the relevance.

15 THE COURT: Well, you do understand that the time
16 period that I am interested in does not mean that any documents
17 before or after are not relevant to understand.

18 MR. CERASIA: I do understand that but this relates to
19 funding for the core. It is not just purely the date, it deals
20 with the core funding which she lost had she was no longer the
21 director of the core.

22 THE COURT: All right.

23 Dr. Tse, why are you presenting this exhibit?

24 MS. TSE: Because this is the most or not the most but
25 the only impartial assessment of the plaintiff's capability to

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1 apply for grants and meet NYU's REF. This is how she
2 performed. On an application that was reviewed months before
3 she was removed as the flow cytometry core director and we will
4 not refer to that event. What I want to do is establish that
5 Dr. Tse is a capable, principal investigator.

6 THE COURT: Are you referring to page 5 of Exhibit 31?

7 MS. TSE: There is NYU 004046, yes, that would be page
8 5, and the review consists of one summary critique and three
9 individual critiques by the reviewers that Dr. Abramson just
10 mentioned and their reviews that specifically pertains to
11 Dr. Tse, the text underlined in red.

12 THE COURT: Under what?

13 MS. TSE: Underlined in red.

14 THE COURT: I am confused, Dr. Tse. Are you saying
15 that your offering is to show that you were considered to be
16 performing very well in December of 2009?

17 (Continued on next page)

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1 MS. TSE: No. The purpose is to show that, yes, I was
2 performing well in 2009. But, along with every, at least NIH,
3 but also other foundation applications, it is very important to
4 show that you were previously funded. And, so, I would, when I
5 applied for a new grant, have to run through the same gauntlet
6 of reviewers, and by showing that they consider me competent,
7 all right, that would pretty much indicate my chances of
8 success. Not that the new set of reviewers would have access
9 to this set of reviews.

10 So what I'm trying to accomplish here is to show your
11 Honor that the plaintiff was a competent investigator, and
12 there is no reason why she should not continue as a competent
13 investigator, if provided with what she needs to maintain that
14 status.

15 THE COURT: I sustain your objection, Mr. Cerasia. It
16 seems to me that the question of competence is not what we are
17 looking at. There are other documents talking about how well
18 you have performed, and actually I think there are letters from
19 either Valentine or Blaser which are quite complimentary. So I
20 don't know that it is necessary to submit Plaintiff's Exhibit
21 31 to accomplish the same purpose. It is cumulative. So I'll
22 sustain the objection.

23 MS. TSE: May I, your Honor, just make this statement
24 that those recommendations were even older than this. That was
25 the basis for Mr. Cerasia's objection that document dates back

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1 to 2009. The recommendation that I got from Dr. Blaser for my
2 promotion was dated 2005. And a lot could have happened or NYU
3 can potentially argue that between 2005 and 2010, my mental
4 condition had degenerated along with my physical condition.
5 And this would pretty much establish that that was not the
6 case.

7 MR. CERASIA: Your Honor, maybe I can sum it up. I'll
8 stand corrected, because the record will reflect I'm
9 100 percent certain that Dr. Blaser said, Dr. Tse, I never
10 questioned your competency technically. So, we've never made
11 an argument that she was mentally incompetent or not mentally
12 competent during the time in question.

13 I think the issue has just been she didn't have the
14 funding. And no one said it was because of mental
15 incompetence.

16 MS. TSE: I'm sorry. The issue came up yesterday
17 about my intellectual piece, if I remembered correctly, and my
18 capability.

19 THE COURT: How did it come up? Who was the witness
20 or what was the document?

21 MS. TSE: I was referring to Mr. Odom's testimony.

22 THE COURT: That what?

23 MS. TSE: I asked him whether he recalled that there
24 is a mental piece to my performance as an associate research
25 professor.

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1 THE COURT: Right.

2 MS. TSE: And he agreed.

3 THE COURT: He agreed that there was a mental
4 component?

5 MS. TSE: No, an intellectual component.

6 THE COURT: He agreed there was an intellectual
7 component. I am still lost as to why you feel that you need to
8 offer Plaintiff's Exhibit 31.

9 MS. TSE: This is an assessment outside of NYU, has
10 nothing to do with the circumstance under which I was removed
11 as core director, but it does establish that I have what it
12 takes to apply for extramural funding, if I was provided with
13 accommodations for my physical impairment.

14 It is a lot closer -- this assessment, first of all,
15 is impartial, and it is a lot closer to the event on April 1st,
16 2010, upon which it became necessary for me to replace the
17 65 percent funding that I had obtained and lost.

18 THE COURT: You're focusing on something that I'm not
19 focusing on. I'm focusing on whether or not you were provided
20 with a reasonable accommodation. And so, your competence at
21 this point I don't believe is in issue. All right. Next?

22 MS. TSE: I will go on. For that reason, we can skip
23 through Exhibit 32 as well. May we continue with Exhibit 7
24 which, if I remember correctly, was admitted into evidence?

25 THE COURT: Exhibit 7?

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1 MS. TSE: Yes.

2 THE COURT: I don't believe that it was. Bear with me
3 just one second. It has not been received in evidence.

4 MS. TSE: May I ask to have it admitted?

5 THE COURT: Mr. Cerasia?

6 MR. CERASIA: I'm going to object on the ground I
7 believe it is irrelevant and deals with the lost budget for
8 when she was the core director, from my understanding.

9 MS. TSE: Yes, but it also shows that I had what it
10 took to be an NIH principal investigator. Dr. Abramson can
11 confirm for us that that's what a typical NIH grant budget
12 looks like. And the salaries in the red box were laboratory
13 assistants that were budgeted by the principal investigator,
14 which at that time was Dr. Tse.

15 THE COURT: And again, the relevance of this?

16 MS. TSE: That I had what it took to do my job for the
17 previous 10 years, because as the principal investigator for
18 the CFAR flow cytometry core, I obtained NIH funding from 2000
19 through 2010.

20 THE COURT: But I don't think that's in issue.

21 MS. TSE: All right.

22 THE COURT: But look, Dr. Tse, explain to me why you
23 think it is.

24 MS. TSE: Because it came up that why was Dr. Tse so
25 insistent on the need for laboratory assistants. For the 10

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1 years up to April 1st, 2010, she had laboratory assistants,
2 which she needed to do her job ever since she came down with
3 osteoarthritis, which was the past 10 years according to
4 Dr. Solitar.

5 THE COURT: But, I'm sorry to interrupt, but I don't
6 think the issue is whether or not you had laboratory assistants
7 when you were core director. I think the issue is, you
8 represented that you needed laboratory assistants.

9 MS. TSE: Yes.

10 THE COURT: Once you were no longer there as core
11 director.

12 MS. TSE: Yes, I did.

13 THE COURT: That was the accommodation you were
14 seeking.

15 MS. TSE: Yes. And I was also very specific about
16 indicating that the laboratory assistants that I asked for was
17 needed for me to generate preliminary data so I can apply for
18 grants.

19 THE COURT: No, that is understood, even by me.

20 MS. TSE: I'm sorry.

21 THE COURT: What I'm saying is I'm not sure that, I
22 don't think it is in issue whether or not you had a staff as
23 core director or what their qualifications were, what their
24 titles were.

25 But you know something, it may be relevant for damages

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1 if applicable, so rather than go back and forth on this, I am
2 going to receive Plaintiff's Exhibit 7 in evidence.

3 (Plaintiff's Exhibit 7 received in evidence)

4 MS. TSE: Thank you, your Honor. May we approach
5 Dr. Abramson?

6 THE COURT: Yes.

7 Q. Dr. Abramson, please confirm for the Court and let us just
8 stay with the first page that this is a pretty typical NIH
9 grant application budget, listing the principal investigator
10 and personnel that he or she needed to accomplish the proposed
11 project?

12 A. Yes, but I have a question. Was this part of a program
13 project grant on which this is a -- the core component of a
14 program project grant?

15 Q. Each core was required to submit individual budgets.

16 A. Understood. But this is for the core component of a larger
17 grant.

18 Q. Yes, it was.

19 A. That's going to be an important point to discuss at some
20 point.

21 THE COURT: Leave it up to your attorney.

22 A. Should I comment? May I comment on that?

23 Q. Yes, please, of course.

24 THE WITNESS: Your Honor, it needs -- it requires an
25 understanding of the submission of grants and the components of

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1 grants. And to the extent that this is a reflection of a
2 person to be able to become a principal investigator on a new
3 grant, it's not clear that this represents that. Because when
4 you are running a core facility, you're providing a very
5 important, frankly, service to a larger grant.

6 What grants are judged on are the innovation, the
7 creativity, the ideas that are being presented to the NIH. Not
8 the capacity of the lab to have a core facility provide the
9 tests that you think are important to answer your hypothesis.

10 So running a core facility is an important skill and
11 very important to a larger enterprise. But the skills drawn
12 from a core facility are not necessarily related to the skills
13 to write a successful principal investigator grant. It is a
14 service contract basically with the NIH.

15 So Dr. Valentine, who I am asking, was the PI on this
16 grant?

17 MS. TSE: As the director. I'm sorry. But as the
18 director of the CFAR.

19 THE WITNESS: Right. Is asking the questions,
20 providing the approach, what tests you want to do for your
21 hypothesis. What is your program.

22 So a grant is judged by innovation, approach,
23 creativity, as well as the ability to execute the grant. And
24 the core facility is the ability to execute a grant. But isn't
25 funded without the other pieces.

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1 THE COURT: All right.

2 THE WITNESS: Okay.

3 THE COURT: Thank you.

4 MS. TSE: Your Honor, may I mention that it came up
5 yesterday that Dr. Tse, absent laboratory assistants, could use
6 data that she generated while she was the core director to
7 establish collaborations with NYU?

8 THE COURT: This is an argument you may make in
9 summation, Dr. Tse. But what I'm concerned about now is you
10 had an opportunity to pursue that with whichever witness it was
11 yesterday. This is a new witness. Would you please ask the
12 questions of Dr. Abramson that are necessary to present your
13 case, and you'll have an opportunity to ask additional
14 questions, but he wasn't here yesterday. He does not know what
15 was said yesterday.

16 So if you're planning on making an argument after all
17 of this is over, then you may do so by comparing various
18 testimonies. But, this I don't think is taking appropriate
19 advantage of the knowledge that Dr. Abramson has. So let's
20 stick with that.

21 MS. TSE: No. Then that's what I will do.

22 So, I would like to proceed to Exhibit 34. This is
23 known as a notice of grant award which I am sure Dr. Abramson
24 is familiar with. May we admit that into evidence?

25 THE COURT: Mr. Cerasia.

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1 MR. CERASIA: If I understand this document correctly,
2 it refers to an equipment grant? For the F-A-C-S all caps, new
3 cap A-R-I-A. Am I correct, Dr. Tse?

4 MS. TSE: Yes.

5 MR. CERASIA: And your Honor at the final pretrial
6 conference said funding for this equipment grant is not part of
7 this case. So I don't think it is relevant. But I don't know
8 why she's introducing it at this point.

9 THE COURT: Yes, would you please explain to me,
10 Dr. Tse, why you want this exhibit in?

11 MS. TSE: First, in response to Dr. Abramson's
12 testimony as to the difference between being a principal
13 investigator on a core grant award, and a principal
14 investigator who was standalone, and also, in response to NYU's
15 testimony that I could have made use of this instrument to
16 establish new collaborations towards my required REF.

17 THE COURT: Bear with me just one second.

18 As I understand it, Dr. Tse, you're offering this
19 exhibit to counter Dr. Abramson's testimony about the
20 difference between a principal investigator on a core grant and
21 a principal standalone investigator. Is that correct?

22 MS. TSE: That's actually not the ultimate goal.

23 THE COURT: What is the ultimate goal?

24 MS. TSE: NYU claimed yesterday or provided evidence
25 yesterday that I could, given that I could not do laboratory

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1 work, use my expertise that I developed as the core flow
2 cytometry director to build new collaborations with
3 investigators at the school. And the events that I would be
4 providing evidence towards took place around May 22, and if I
5 may present Dr. Tse's position at that time, she was --

6 THE COURT: I'm totally confused.

7 MS. TSE: All right.

8 THE COURT: I'm totally confused.

9 MS. TSE: I'm so sorry, your Honor.

10 THE COURT: That's not your problem, that's my
11 problem. But, it would help if I did understand.

12 MS. TSE: Can I put it simpler, and if I would refer
13 to things I should not, just let me know because I don't know,
14 you know, whether I am making a serious blunder.

15 THE COURT: You know what, don't worry about that.
16 But what my concern is, this is, as Mr. Cerasia said, an
17 application for a machine, correct?

18 MS. TSE: Yes.

19 THE COURT: So how is that different from being CFAR
20 director?

21 MS. TSE: The machine was independent of CFAR, totally
22 independent of CFAR.

23 THE COURT: Was it a research grant application?

24 MS. TSE: Yes, it was.

25 THE COURT: In that, let me rephrase that. Was it a

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1 pure research grant application that would require use of
2 machines to come up with or to prove the theory or was it an
3 attempt to obtain another machine?

4 MS. TSE: No. A shared instrument grant is when you
5 apply to an NIH for an award that would allow you to purchase,
6 usually, a very expensive state-of-the-art instrument. On that
7 grant, you have to list the number of collaborators, not a
8 single one. That's why it's known as shared instrument. It's
9 not going to be my instrument. It's an instrument that's going
10 to be shared with a large number of investigators. And each
11 one of those investigators, together with myself, will have to
12 propose what this machine is going to be used for.

13 And let's say an example, this machine will be used to
14 detect and isolate very rare cancer cells so that we can find
15 out why these patients develop cancer. And if I remember
16 correctly, and there was at least half a dozen different
17 investigators on this grant. And approval for the grant
18 depends, first of all, on my capacity as the principal
19 investigator, knowing the instrument, knowing what it can do,
20 be able to oversee its operation and maintenance, because this
21 was an instrument that cost about \$500,000. So the NIH is not
22 going to give out money freely to anybody who just simply asks
23 for it.

24 But that is not the only component in this grant.
25 There is also a very scientific component, meaning that the

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1 investigators who were listed as what is known as key personnel
2 on this grant will be working with me, using this instrument,
3 to arrive at a certain goal in their proposed research
4 projects. Now, let me --

5 THE COURT: Let me just ask you. As part of this
6 application, did you also submit a proposed project that you
7 would be using the machine for?

8 MS. TSE: Yes. I did. But, if that's the only piece,
9 it would not qualify for a shared instrument grant.

10 THE COURT: So, can you point me to where your
11 research aspect as opposed to obtaining a machine aspect is in
12 this grant?

13 MS. TSE: I will have to pull up the grant application
14 itself, which I can do, but it will take me a while. It is in
15 my computer. And I believe it was actually or excerpts of it
16 were submitted during the response to summary judgment.

17 THE COURT: I am going to not receive this document in
18 evidence at this time.

19 MS. TSE: May I add one more thing? If you recall,
20 I'm sorry, your Honor, but if you recall, NYU provided
21 testimony that rather than accommodate my need for laboratory
22 assistants, I could have used the instrument or the data that I
23 collected using this instrument to set up collaborations so
24 that I can have my salary supported. And I would like to
25 present evidence to the Court why I was not able to do that.

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1 THE COURT: This will do this, this particular
2 Plaintiff's Exhibit 34 will do that?

3 MS. TSE: Exhibit 34, if we go to the second page,
4 which would be plaintiff 0851, underlined in red, that there is
5 a proposal involved and the award was based on the proposal.
6 And if the Court would like me to pull up that proposal, I
7 would need --

8 THE COURT: I think we're getting far afield here.
9 Are you pointing to this page plaintiff's 0851 to show that
10 there are limitations on how the machine could be used? I'm
11 not exactly sure what this says.

12 MS. TSE: What it said is in the view of the NIH, I
13 was a principal investigator. And nowhere in this notice of
14 award was the Center for AIDS Research mentioned. So this is a
15 standalone, independent, grant application on my part.

16 THE COURT: Right. For a machine.

17 MS. TSE: Yes, but in order to --

18 THE COURT: No. We've spent enough time on this. We
19 have a witness on the stand and who is sitting here not being
20 asked questions. Please take advantage of the live presence of
21 Dr. Abramson. I am not going to receive this document in
22 evidence at this time. If you lay a foundation for it at some
23 other point, you may seek to reoffer it. But at this point I'm
24 not receiving it in evidence.

25 MS. TSE: All right. Can we establish at this point,

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1 may I reiterate that NYU provided testimony --

2 THE COURT: No. I don't want to hear about -- this is
3 argument, Dr. Tse. We have a witness here who has been sitting
4 here silent for at least half an hour.

5 MS. TSE: I'm sorry, your Honor. I will move on in
6 the best of my ability.

7 BY MS. TSE:

8 Q. Dr. Abramson, can you confirm that when you have an
9 instrument that is shared, the users have to pay what is known
10 as charge back fees?

11 A. That's correct. Well, it's not -- it will vary with the
12 laboratory, but that is not an uncommon model.

13 Q. All right. Without going back into grant applications and
14 so on and so forth, suffice it to say that after I was awarded
15 this grant, I purchased the machine, saw to it that it was
16 functional, including designing a proper laboratory to house
17 the instrument, and put it into operation, and saw to it that
18 it was properly maintained. And --

19 THE COURT: Wait. Please, is that a question or is
20 that a statement?

21 MS. TSE: No, I'm just running by Dr. Abramson and I
22 would ask him --

23 THE COURT: Just ask the question. Because what is
24 happening here is I'm not sure whether you are summing up,
25 whether you're giving testimony, or whatever. Are you asking

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1 the witness to assume certain facts and then asking him a
2 question? Or are you asking him to confirm certain facts?

3 MS. TSE: I would rephrase it so it would be a
4 confirmation.

5 Q. All right. Dr. Abramson, upon receiving such an award,
6 would the principal investigator have to first purchase the
7 instrument?

8 A. Yes, of course. Well, the university purchases the
9 instrument based on the dollars that come in, yeah.

10 Q. And the selection of the instrument would be based on the
11 grant application as specified --

12 A. That's correct.

13 Q. -- in the grant application.

14 Subsequent to that, it would be the responsibility of
15 the principal investigator to design, if necessary, a proper
16 laboratory where the instrument would be placed. Is that
17 right?

18 A. Well, again, Dr. Tse, it depends. It depends. So let me
19 just comment. An instrument grant of that size from the NIH is
20 granted based on multiple, as you said, sharers, shared users.
21 And they judge the merit of the application on the independent
22 NIH funding of the collaborative group of principal
23 investigators.

24 So, the award is not to the person who is going to
25 oversee the machine per se, the instrument -- although that

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1 person will be a user and whatnot. But if there are, I don't
2 know how many there are on this, usually there's five, six,
3 seven.

4 Q. About six.

5 A. Six PIs. And the merit of the application is based on how
6 the grants of those PIs, which must be NIH funded as PIs, will
7 take advantage of this machine to study cancer cells or
8 proteins or whatever it measures.

9 So, the awarding for an instrument grant depends upon
10 the intellectual capital of the six PIs.

11 Then, all of these instruments are not owned by the
12 person who makes the application, the PI for the core of the
13 instrument. They're owned by the department, initially the
14 medical school, because they're \$500,000 instruments. And then
15 the decision of where that instrument lives, the way people
16 utilize it, whether there are charge backs, that's frankly
17 usually a departmental chair or the scientist that oversees it.

18 So it's not a simple I am going to apply for an
19 instrument, it's my instrument. It is by definition a
20 collaborative resource for multiple investigators, and
21 therefore, when it's collaborative of multiple investigators,
22 no single person makes the decision. It is usually the
23 chairperson or something like that. It is more complicated
24 than a simple "I'm making an application for a grant and I am a
25 PI of the instrument grant."

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1 Q. In addition, the responsibility of the principal
2 investigator would be to see to the operation and maintenance
3 of this instrument, which is also described and included in the
4 application?

5 A. That's right. So it's a part of a core facility. Because
6 by definition, it is a core utilized by multiple other people.

7 Q. I don't believe that it's considered a core. But, you
8 know --

9 THE COURT: You're not going to argue with the
10 witness.

11 MS. TSE: I'm sorry.

12 THE COURT: He has given his testimony. If you have
13 something to refute it.

14 MS. TSE: Yes, I do. Since Dr. Abramson stipulated
15 that the instrument belongs to the university, may I bring up,
16 admit into evidence Exhibit 37 which are excerpts from the NIH
17 grants policy statement that says otherwise?

18 THE COURT: What? Are you saying that this
19 contradicts Dr. Abramson's testimony?

20 MS. TSE: In some ways, or in major ways.

21 THE COURT: Well, under those circumstances, you don't
22 even have to put it into evidence. You can just use it to
23 question Dr. Abramson in terms of "is it true that" and then
24 you can read from this.

25 MS. TSE: All right.

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1 THE COURT: Before you do that, let's take our morning
2 break.

3 (Recess)

4 (In open court)

5 THE COURT: Dr. Tse.

6 MS. TSE: Your Honor, may we approach Dr. Abramson
7 with a copy of what I will be discussing with him and --

8 THE COURT: Are you talking about the Exhibit 37?

9 MS. TSE: Yes, so he can see what I'm referring to.

10 THE COURT: No, no, I did not receive it in evidence.
11 So I said that you can use it as a good faith basis for asking
12 him particular questions.

13 MS. TSE: All right.

14 THE COURT: Okay?

15 BY MS. TSE:

16 Q. The document I'm referring to, which I'm sure you're quite
17 familiar, is the NIH grants policy statement.

18 A. Okay.

19 Q. And the sections that I'm referring to --

20 THE COURT: No. Just ask him a question based on
21 something in that document.

22 MS. TSE: Very well.

23 Q. Once the award is accepted by the grantee, which is NYU,
24 the contents of the notice of grant award or NGA are binding on
25 the grantee. Does that sound familiar?

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1 A. I believe so. I have not read the document.

2 Q. All right. So, once the award is made by the NIH, and the
3 money from the award was used towards the goals in the
4 proposal, then the award or the terms of the award becomes
5 binding.

6 A. Hmm-hmm.

7 THE COURT: Are you saying yes?

8 THE WITNESS: Yes, I am, sorry.

9 Q. Next issue. A grant to an individual --

10 THE COURT: Let me just ask you, what do you mean by
11 terms of the award?

12 MS. TSE: Oh, referring back to that notice of grant
13 award, which is Exhibit 34.

14 THE COURT: Okay. That also is not in evidence as far
15 as I know. Let me ask you, Dr. Tse, are there specific terms
16 that you want to ask Dr. Abramson about in terms of how are
17 they enforced or what does it mean?

18 MS. TSE: Basically, how should it have been enforced.
19 Because this instrument was appropriated and given to another
20 individual.

21 THE COURT: That's where we're going with this?

22 MS. TSE: Yes.

23 THE COURT: Okay. That's off base. Move on. Do you
24 have anything that deals with whether or not you were provided
25 with an accommodation for the period of time that we're talking

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1 about? Don't go back to "I don't like the fact that I was
2 removed."

3 MS. TSE: No, no, no, this has nothing to do with my
4 being removed. I am referring to events that took place around
5 May 22, 2010.

6 THE COURT: Ask him about events that took place
7 around May 22, 2010.

8 MS. TSE: I will ask him that first, and then refer
9 back to the NGA and the NIH grants policy, if your Honor thinks
10 that that would be necessary.

11 THE COURT: All right.

12 MS. TSE: Am I more on point?

13 THE COURT: I don't know. Let's see where it goes.

14 MS. TSE: All right. But I would like to reiterate
15 what Dr. Abramson said just before the recess. That one has to
16 pay generally charge back fees to use what is known as a shared
17 instrument.

18 Q. And the principal investigator, Dr. Abramson, of that
19 instrument, would be the individual who collects those fees, is
20 that right?

21 A. Not necessarily. No. It may be that the department
22 collects the fees. Remember that these instruments are shared
23 among six, in this case, PIs. There is no firm -- it never
24 goes to the individual per se who oversees an instrument as a
25 standard way.

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1 The, again, the instrument belongs to the department,
2 to the medical school. There is an operator of that
3 instrument. That operator of that instrument may leave or
4 stay. That instrument is a resource for the community of
5 investigators, whoever is overseeing it, and however, frankly,
6 it was obtained.

7 THE COURT: Let me ask you, Dr. Abramson. Let's say
8 there were seven investigators who supported the application
9 for the machine. Once the grant is given, does that mean that
10 only those six or seven people can use the machine? No one
11 else can?

12 THE WITNESS: That's a very important point in this
13 context. The machine is primarily to service those grants so
14 they have first access to it and ordinarily do not pay a fee to
15 utilize it, because the grant is paying the fee. You write a
16 grant that says "I am going to do X number of tests" and that
17 goes to pay for the operations.

18 Sometimes, but not always, the department will say,
19 you know, I have this machine, others may want to use it, but
20 for them I'm going to charge the users fee. So it really
21 varies.

22 In, frankly, many of these shared instrumentation
23 there is no fee applied to it because it used to the community
24 of people who are -- who applied for it. But it really varies.
25 A lot depends on how much time during the day the instrument is

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1 used. So if seven people get the instrument, but find they're
2 only using it one day a week to service their grants, then the
3 smart approach will be are there other people who want to come
4 and pay for it.

5 But there is no absolute standard approach to this.

6 THE COURT: So if you are not on a grant, and you want
7 to use machines that came with a grant, you could be asked to
8 pay for it.

9 THE WITNESS: That's correct.

10 THE COURT: What about people? If you ask to use, for
11 instance, lab assistants who came with someone else's grant,
12 would that also require you to pay for their time or would they
13 be just thrown in with the lab?

14 THE WITNESS: Usually, lab assistants work
15 specifically on projects for which they were funded by their
16 principal investigator. Sometimes two investigators will share
17 an assistant. But usually it's -- they're not to be utilized
18 by people who come in, unlike the instrument, by people who
19 come in to get their services.

20 THE COURT: Thank you. Dr. Tse.

21 BY MS. TSE:

22 Q. The history of the FACS Aria, the grant was awarded in 2007,
23 and since then, there, like you explained to Judge Batts, there
24 were charge back fees on the order of about \$75 an hour. And
25 given that at that time it was state-of-the-art instrument,

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1 requires experts not only to design the experiment but also to
2 operate the instrument, the \$75 an hour is actually very
3 reasonable and was placed in, I think, the correct term or the
4 NYU term for it is an operating account, from which Dr. Tse was
5 drawing her salary and salary for the laboratory staff.

6 Is that about right?

7 A. How dollars are used, accrued to the department for access
8 to a machine, will vary according to the needs of the
9 department. If, for example, the core director or the person
10 operating the machine has another salary source from the school
11 or the department, and dollars committed for use, the
12 chairperson may decide to use those dollars for something else.
13 There is no strict rule that a fee that comes in for a machine
14 goes to pay for the director of the machine. It's at the --
15 all of this is how one manages a laboratory.

16 Q. Can you then explain to the Court how those determinations
17 and decisions were made?

18 A. In this case, I don't know. You're asking me a generic
19 question?

20 Q. Yes. Let's say not in particular the FACSaria, but a
21 different machine. A different cell sorter.

22 A. A person who is running a core facility or an instrument,
23 regardless of whether they're tenured or not tenured, is
24 serving at the will of the person who is responsible for that
25 laboratory. There is another obligation, and if the person is

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1 doing the job, they stay on the job. If for whatever reason
2 the chairperson or the PI says I need to make a change, then a
3 change gets made.

4 A core director is an employee providing a service to
5 other investigators. And as any employee, judgments are made
6 as to whether they're doing what needs to get done or not.

7 So, there's no rules in any individual case except
8 what I'm saying.

9 Q. Then let's get back to the case of the FACSARIA. Dr. Tse
10 was the named principal investigator, so would it be up to her
11 or somebody else, like, for example, a department chair who was
12 not the principal investigator?

13 A. Yes. So this was a program grant with a instrument. Let
14 me just make sure I'm following -- is this the instrument grant
15 or --

16 Q. This is an independent standalone shared instrument grant.

17 A. Right. The person who is the PI in the grant, because it
18 is an instrument grant owned by the school, has no ownership
19 over that instrument. So if the decision has to be made that
20 the instrument is servicing multiple investigators in the
21 department, the chairperson or the PI can make a change over
22 who is operating the instrument. These --

23 Q. But may I --

24 THE COURT: Let him finish his answer. Then you can
25 put another question.

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1 MS. TSE: Sorry.

2 A. You know, an instrument is not -- the PI of the instrument
3 grant really is not the decider, as it were, of who is going to
4 oversee the operations of the instrument, if there are issues
5 coming up with regard to the competency or ability to oversee
6 that instrument.

7 Q. Now, in the case in front of us, the shared instrument
8 grant was awarded to Dr. Tse. But what you are telling the
9 Court now is somebody else can take over the operation of the
10 instrument and redirect its proposed goals?

11 A. That's absolutely correct. This is different from a grant
12 that is -- the traditional research grant. I would ask the
13 question or frame it this way. Would the person who is the PI
14 of the instrument grant, in the absence of the other six
15 investigators who NIH funds, have ever successfully had the NIH
16 give them a half a million dollar grant? And the answer in
17 that hypothetical is no. The NIH doesn't give half a million
18 dollar grants to a person who runs a core facility because they
19 write a grant.

20 The only reason an instrument grant at that level is
21 given is because the level of the science of the six NIH funded
22 investigators, and they're usually leaders in their field with
23 multiple R01 grants to invest that kind of money. It's because
24 of them that the grant is being given to the institution. The
25 NIH is investing in the science, not in the engine that's doing

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1 the tests.

2 So this is a very different kind of circumstance when
3 an instrument comes into the laboratory.

4 Q. You are familiar then with what is known as a progress
5 report. Can you explain to the Court what that is?

6 A. Ever hear of the NIH ask for a progress report as to what
7 was done under the grant that was funded. Were you executing
8 the grant as you had promised. So it is a three-page report
9 each year, typically.

10 Q. Who gets to write that progress report?

11 A. It's usually the PI of a particular grant.

12 Q. So, you expect that in this case, Dr. Tse would be the
13 person?

14 A. So long as Dr. Tse was the director of this particular
15 instrument. That's correct. If a change had to be made, that
16 other person would do it.

17 Q. All right. In that event, let us see if what Dr. Abramson
18 had just testified to agrees with what is in the NIH grants
19 policy.

20 MS. TSE: May I?

21 THE COURT: What's the question, Dr. Tse? I can't
22 tell until I hear what the question is.

23 MS. TSE: I'm waiting to see if everybody is ready to
24 move on to validating by the NIH grants policy statement what
25 Dr. Abramson just testified to.

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Abramson - direct

1 THE COURT: All right. What is it in that policy that
2 you wish to --

3 MS. TSE: I will go through it --

4 THE COURT: No just --

5 MS. TSE: Very well.

6 Q. On page 108 of the policy, a grant to an individual may not
7 be transferred. Page --

8 THE COURT: Wait. Let him respond to that.

9 THE WITNESS: I have to see the policy.

10 THE COURT: For these purposes, I'm going to
11 provisionally admit into evidence -- what is the number?

12 MS. TSE: 37.

13 THE COURT: All right. Plaintiff's Exhibit 37. If it
14 turns out that this is not relevant, this and the testimony
15 will be stricken.

16 MS. TSE: I understand.

17 (Plaintiff's Exhibit 37 received in evidence)

18 MS. TSE: May we approach?

19 THE COURT: Yes.

20 (Continued on next page)

21

22

23

24

25

G6F5tse3

Abramson - direct

1 THE WITNESS: So your question is on page 108?

2 BY MS. TSE:

3 Q. Yes.

4 A. A grant to an individual may not be transferred. Is that
5 correct?

6 Q. Yes.

7 A. My first question is, is this applying to an
8 instrumentation agreement or just grants in general?

9 Q. This is grants in general.

10 A. In general.

11 And so, it is not clear -- I would have to look into
12 it, whether an instrumentation grant would be considered the
13 same, number one.

14 Number two, I'm not sure what it means, and I would
15 ask what transfer to this grant means. Does it mean the person
16 overseeing the instrument was changed?

17 THE COURT: Or does it mean it was sent to another
18 institution?

19 THE WITNESS: Right. Because if there is a question
20 of -- and again, this is not at all related to anything about
21 this case, if it comes to pass that the person operating the
22 machine is felt not to be able to service the needs of the
23 other investigators, then a change would need to be made
24 because an instrument is different from a traditional grant.

25 BY MS. TSE:

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Abramson - direct

1 Q. Then let us go to page 112. Requests for prior approval.

2 A. What is the question?

3 THE COURT: What page are we on?

4 MS. TSE: 112, your Honor, of Exhibit 37, and that
5 would be the policy statements page.

6 THE COURT: Bear with me one second. All right.

7 Q. Now, under that paragraph the policy states: All requests
8 for NIH awarding office, prior approval must be made in writing
9 which includes submission by e-mail to the GMO -- which is
10 grants management office, that would be at the NIH -- no later
11 than 30 days before the proposed change. The request must be
12 signed by both the PI -- principal investigator -- and the AOO,
13 which is an organization at the institution -- or the NYU in
14 this case.

15 Do you have any comments on that, Dr. Abramson?

16 A. I'm not sure what the question is.

17 Q. My question is, for this case in particular and NYU in
18 general, you would abide by this stipulation?

19 A. I would have to -- you would have to be more specific as to
20 what I am abiding by.

21 Q. All right. It says --

22 THE COURT: Just a second, Mr. Cerasia, please. You
23 have been very patient.

24 MR. CERASIA: Your Honor, I would just like to make
25 one clarification. If you look at the top of page 108, this

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Abramson - direct

1 talks about a change of grantee organization and this is a
2 policy that deals with the transfer of the legal and
3 administrative responsibility for grant-supported project or
4 activity from one legal entity to another. That's the whole
5 context here. It is not clear to me that that's the question
6 that is being asked, that we are talking about a transfer from
7 one legal entity to another which is not relevant to this case.

8 THE COURT: Dr. Tse?

9 MS. TSE: I didn't -- when I read over the entire
10 policy statement I did not interpret it as such. So, I am open
11 to input from Dr. Abramson.

12 THE WITNESS: Well, again --

13 THE COURT: Wait a second, sir.

14 THE WITNESS: I'm sorry.

15 THE COURT: I think Mr. Cerasia raised a very valid
16 point. Just looking at the face of the document it is not
17 clear to me that the section that you read is not affected by
18 "or inclusive in change of grantee organization."

19 MS. TSE: That is immaterial and may I just explain --

20 THE COURT: I think it is quite material.

21 MS. TSE: -- from my perspective why that is?

22 A grant to an individual may not be transferred and
23 that would mean that even if, let's say, Dr. Tse were to
24 relocate from NYU to Columbia University, she could not take
25 this instrument with her but as long as she stays within the

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Abramson - direct

1 same institution, since the grant was awarded to Dr. Tse as the
2 principal investigator, it may not be transferred. And, if the
3 transfer was to be made there are certain guidelines.

4 THE COURT: What does this have to do with an
5 accommodation?

6 MS. TSE: This instrument generates revenue from
7 chargeback fees. When I was operating and overseeing the
8 operation of this instrument in fulfillment of the proposed
9 projects, the chargeback fees were deposited or paid to what is
10 known as an operating account which pays for my salary as well
11 as the salary of laboratory personnel. All right?

12 On about or around May 22nd, 2010, this instrument was
13 taken from me and given to another individual and the NIH
14 stipulated guidelines was not followed.

15 THE COURT: Again, what does this have to do with an
16 accommodation?

17 MS. TSE: Not only was Dr. Tse not accommodated.

18 THE COURT: Well, that's the only thing that is at
19 issue before me here and now. Your position is that you were
20 not accommodated. What they did with this machine is not
21 before me right now. So, I do not see the connection between
22 what is at issue before me and whether or not the terms of this
23 grant were abided by by NYU.

24 MS. TSE: All right. Then using this instrument
25 further incapacitates Dr. Tse's ability to meet her REF which

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Abramson - direct

1 was NYU's basis for terminating her appointment.

2 THE COURT: Mr. Cerasia.

3 MR. CERASIA: Yes, your Honor.

4 We dealt with this at the final pretrial conference
5 dealing with the loss of funding for the machine and your Honor
6 ruled that, *It is not before me and we are not going to get*
7 *into it now in the trial.*

8 It was funding that she had as a core director. She
9 lost that funding when she was no longer the core director.
10 The only issue that is, as your Honor noted, is whether or not
11 the University failed to reasonably accommodate her from June
12 2010 to April 2011. One of her arguments is I needed somebody
13 to do work on the machines and our argument is you first have
14 to come up with the scientific idea before you get entry to the
15 machine. If you needed money to pay for the machine because
16 you had a scientific idea you should have asked us. It had
17 nothing to do with the grant. This grant money is gone, it is
18 out of the case because it relates to her time as a core
19 director.

20 THE COURT: All right. I agree that we are not going
21 to deal with Exhibit 37, we are not going to deal with the
22 grant money having been lost. That is not relevant to the
23 issue before me.

24 MS. TSE: Your Honor, may I point out that on May
25 22nd, 2010, when this instrument was removed from Dr. Tse there

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1 was no grant at issue here. The grant was awarded in 2007. It
2 was spent and the instrument, as proposed, was up and running
3 by 2008. So, Mr. Cerasia's statements were not accurate.

4 THE COURT: I think that they were --

5 MS. TSE: Second --

6 THE COURT: Dr. Tse.

7 MS. TSE: I'm sorry. I didn't mean to interrupt.

8 THE COURT: I made a ruling. This is out. That
9 exhibit is out. Let's not have any more questions dealing with
10 your removal from that position. Let us focus on what you
11 needed as an accommodation once you were removed.

12 MS. TSE: What I needed --

13 THE COURT: No, no. I'm not asking you to tell me. I
14 am asking you to take advantage of the --

15 MS. TSE: I will do that.

16 THE COURT: Don't interrupt me. I am telling you what
17 you need to do.

18 MS. TSE: I am very sorry, your Honor.

19 THE COURT: Dr. Abramson is here for a limited period
20 of time. Ask him questions that relate to his knowledge or
21 role in terms of your accommodation or lack thereof.

22 BY MS. TSE:

23 Q. Given that Dr. Tse had proposed, like you said, towards the
24 shared instrument grant award, she had made contact with
25 numerous investigators, explored the possibilities for

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1 research --

2 THE COURT: Is this going to end up in a question?

3 MS. TSE: Yes, it would, because I first want to let
4 Dr. Abramson know that there were, including myself, actually
5 about 10 different investigators and it is NYU's position that
6 I do not really need laboratory assistance, I could use my
7 history of flow cytometry, expertise in flow cytometry to reach
8 out to 10 other, for example, investigators that I have worked
9 with to see if we can develop -- turn those collaborations into
10 grant applications. So, there is really no need for NYU to
11 provide me with those laboratory assistants.

12 Would you agree that while I had this machine --
13 Dr. Tse had this machine under her authority, it would make
14 those collaborations possible or facilitate, at the very
15 minimum, those collaborations?

16 THE COURT: I don't understand the question.

17 BY MS. TSE:

18 Q. Without the instrument, would Dr. Tse be in a position to
19 offer those collaborations to people she had once worked with?

20 THE COURT: Okay.

21 Are you in position to answer that?

22 THE WITNESS: I can speculate maybe.

23 THE COURT: No, we don't like speculation.

24 In your professional opinion --

25 THE WITNESS: In my professional opinion -- so, what

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Abramson - direct

1 you are kind of asking again, you needed to have the machine.
2 It seems to me that decision was already made independent from
3 this issue of collaboration. So, let me just say that.

4 To get other people involved in a collaboration they
5 have to be excited about your idea because they often have to
6 invest money in it, or time. So, the first step is I can't
7 answer whether your machine would have made a difference or not
8 but I can answer the fact that collaborations are born from
9 common, mutual interest in an idea. And so, the responsibility
10 first of the person seeking a collaboration is to excite
11 another person in the idea, and then that person will bring
12 something else to that collaboration that might be finances,
13 resources, maybe a technician, but it begins with the idea and
14 once the idea is captured, people then figure out how to get
15 the work done.

16 So, in answer I guess specifically to your question,
17 the use of the machine would not necessarily have made a person
18 more excited about the idea and if they were excited about the
19 idea because it is a user fee, they would have been able to get
20 preliminary data regardless of who was operating the machine.

21 BY MS. TSE:

22 Q. So Dr. Tse must have got 10 different investigators
23 throughout different departments of the school excited about
24 utilizing flow cytometry towards their investigative goals
25 because those 10 investigators not only had to come up with a

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1 proposed research project together with her because none of
2 those really have any expertise in flow cytometry or
3 established expertise in flow cytometry --

4 THE COURT: Are we going to get to a question soon?

5 MS. TSE: Yes, I will.

6 THE COURT: Actually, I'm not sure that this question
7 follows from Dr. Abramson's testimony. I don't believe that he
8 limited it to getting them excited about utilizing flow
9 cytometry.

10 MS. TSE: No. It's not restricted to flow cytometry
11 but one has to take into consideration that that is my field of
12 expertise. So, when you have a collaboration, different
13 investigators will bring to the table their expertise. For
14 instance, there was an investigator on the shared instrument
15 grant application. Dr. Canary. He was actually not at the
16 medical center but he was from the chemistry department at
17 Washington Square. He wanted to use flow cytometry to study
18 Manganese levels in living cells and the NIH approved the grant
19 because, normally, that is something that the reviewers
20 considered innovative, exciting, and will contribute to new
21 knowledge. All right?

22 That's generally how, like Dr. Abramson stated
23 earlier, grants were approved.

24 So, I had made contact with, according to his
25 statement, and pretty much --

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1 THE COURT: Is this your testimony now?

2 MS. TSE: No, no, no. There is a question there.

3 THE COURT: Well, I don't know where it is.

4 BY MS. TSE:

5 Q. The question is, would removing Dr. Tse as the authority
6 and the principal investigator of this instrument promote her
7 ability to collaborate with these individuals?

8 A. No. And let me tell you from my own experience because I
9 have run a laboratory for 30 years, I have two NIH grants right
10 now.

11 Flow cytometry, for example, is now a core facility at
12 the School of Medicine, it is not the machine that Dr. Tse ran.
13 If I have a neat idea and I want to talk about it, we do it
14 with the core facility at the school and we find the resources
15 to do it, and it is not that expensive, frankly, because what
16 you are doing with a grant application is getting preliminary
17 data so you need several experiments that work, reasonably not
18 very costly -- it is not very costly to get preliminary data in
19 many instances and it may vary on what you are studying. But,
20 if I want to collaborate with somebody because I am intrigued
21 with the idea and we find resources to do preliminary
22 experiments and I think we are perseverating on this one
23 critical machine being critical to people's success, even
24 Dr. Tse's success.

25 So, as a non-director of that machine, if there is a

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1 great idea that other people were interested in and you would
2 find other people who had resource because they have other
3 grants, projects would go forward whether or not you were the
4 director, in my view.

5 So, I think one has to separate the engagement of
6 other scientist or he idea whether one person has easy access
7 to an instrument. That's not the way science is done anymore.
8 It may have been many years ago where one person had the
9 machine and if that person had a monopoly on that machine I
10 could do a test, right, nobody else. Flow cytometry is
11 standard and everybody in the school does it and you can go on
12 the website and you can go on the website and see how do I get
13 it done and how much does it cost.

14 So, the particular expertise in modern day science and
15 a particular machine is no longer critical to success. That's
16 why the school has what we call core facilities for all
17 investigators in the school.

18 Q. And you don't then agree with the NIH that the awardee of
19 the instrument needs to have expertise when --

20 THE COURT: Objection sustained.

21 Q. All right, let's reword this.

22 THE COURT: No, let's move on.

23 Q. So, Mr. Abramson, how -- can you tell the Court, after what
24 you have learned this morning, in what manner did NYU
25 accommodate Dr. Tse's disability so she could meet her job

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Abramson - direct

1 expectations, the 60 percent REF --

2 A. I can say --

3 Q. -- and more, the minimum 60 percent REF?

4 A. You asked me a few questions about what one would do. From
5 what I understand --

6 Q. No, specifically --

7 THE COURT: No, no, no. Do not argue with the
8 witness.

9 MS. TSE: I'm sorry.

10 THE COURT: You put a question. He is trying to
11 answer it.

12 THE WITNESS: All right, because it is a complicated
13 question with multiple dimensions.

14 What I said in that is that someone who is removed as
15 a core director for whatever justification now is not being
16 funded because a big part of their salary is not funded, the
17 department chair and the investigator can work together to try
18 and find alternatives. With a non-tenured faculty member there
19 is, in my view, no obligation to do so. You tried -- you were
20 with Marty Blaser, one of the nicest men at the medical school;
21 Dr. Reibman, a very lovely person. I'm sure they tried to be
22 helpful. On the other hand, if there was no money -- and this
23 is, by the way, a time when the NYU School of Medicine was
24 losing over a hundred million dollars a year and a lot of it
25 from research -- and so there was not a lot of extra money in

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1 the system. And so, one can't simply say an investigator has
2 lost their grants, I have a pile of money over here and I am
3 going to give it to them.

4 The obligation is to run an efficient lab and to get
5 people funded and to be as helpful as they can. I understand
6 they did -- a year went by and then you were in the laboratory
7 and tried to do some work. Beyond that, as a non-tenured
8 faculty who serves at-will, the department had no further
9 obligation, from what I know about the situation, to provide
10 assistance, help, technicians, or more money after it became
11 clear that you were not able to gain funding. Then it becomes
12 the discretion of the chair who is trying to manage a budget
13 under very strict circumstances.

14 I must -- the other context, the NIH in this period
15 even today only funds 10 percent of the grants that are applied
16 for and so it is a real crisis in science. People who were
17 funded are no longer getting funded so what you are
18 experiencing was not unique but it made it very hard to find
19 extra money from research to move around to other people.

20 Unfortunately, as a consequence, some people have
21 lost -- lost their positions. And this is happening around the
22 country, where people in science are losing their positions
23 because there is very inadequate amount of money to fund
24 research in the country.

25 So, my view is that that kind of work with the chair

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Abramson - direct

1 was done for a while and that if they couldn't do more, that's
2 just unfortunate.

3 BY MS. TSE:

4 Q. Are you explaining to the Court that Dr. Tse contributed to
5 the \$100 million default that you said just came from research?

6 A. No. Not at all. But I am saying there was not extra money
7 in the school in the departments to subsidize people who were
8 unable to get their own grants. That's all I'm saying. It is
9 not a particular person. It was not a period -- years ago
10 there was a lot of money in the system and people could be
11 supported for longer periods. In fact, the reason we even put
12 in that 60 percent floor was that we were trying to stop a
13 hemorrhaging, frankly, of scientists who -- researchers who
14 were poorly funded. We had no benchmark, like many schools
15 have around the country, to say you really have to try and do
16 better. People were just collecting -- we had \$20 million of
17 salaries going to faculty with no grants so we put in place
18 these parameters. We guided them in over about a four-year
19 period and then we have standards at NYU that everyone
20 understands is the 60 percent but it was in the context of we
21 just can't continue to give dollars for research when there is
22 no dollars coming in for research.

23 Q. Can you please then explain to the Court that if NYU feels
24 empowered to regularly remove awards that Dr. Tse has succeeded
25 to obtain from the NIH, how would she ever meet the 60 percent

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1 REF?

2 MR. CERASIA: Objection.

3 THE COURT: Sustained.

4 BY MS. TSE:

5 Q. You just mentioned that around April 2010 or between April
6 2010 to April 2011, is it your position that for lack of money
7 NYU would not be obligated to provide reasonable accommodations
8 to Dr. Tse's impairment?

9 A. That's correct. That's correct.

10 That -- that the organization has to be
11 self-sustaining and it is unfortunate that decisions have to be
12 made that sometimes employment can no longer continue if a
13 person failing -- failing to meet the expectations of getting
14 extramural funding. If a person is hired as a scientist and a
15 scientist is not getting extramural funding, then that's a
16 failing scientist, period. And you can't maintain people who
17 are not getting grants.

18 Q. Without going into the details, can you then at least
19 explain to the Court what time and effort reports are about,
20 that is, how you determined a faculty member's percent REF? Is
21 that right?

22 A. Well, we don't call it time and effort. It is in the
23 document that you showed on calculating REF.

24 Q. Yes.

25 A. We basically say if you have a hundred percent work effort

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1 you are a hundred percent researcher, 50 percent researcher and
2 get another 50 percent of your salary from a non-research
3 source such as core facility or seeing patients if you are an
4 M.D. and scientist.

5 Q. Dr. Tse's time and effort reports that she filed with the
6 school, her percent REF for the three years preceding August
7 31st, 2010 was 100 percent, 95 percent, and better than 80
8 percent. Do you consider that the track record of a failing
9 scientist?

10 A. It depends on what happens subsequent to that period. So,
11 that's a point in time but, unfortunately, if no grants come in
12 subsequently, that person has begun to fail, frankly.

13 Q. Going back to Exhibit 10, which is the policy, can you
14 please explain to the Court what you mean by the additional 10
15 percent REF in recognition of outstanding academic
16 achievements?

17 THE COURT: Would you refer us to the particular place
18 in this exhibit where there is?

19 MS. TSE: Yes, I will as soon as I -- Dr. Abramson may
20 be better --

21 THE WITNESS: 3083(d) Acceptable Academic
22 Contributions.

23 BY MS. TSE:

24 Q. Yes. There is a list of them, and for the benefit of the
25 Court, can you please explain to them, specifically (d)(2), why

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1 a faculty member will get additional REF?

2 A. So, this was an attempt to give credit to faculty members
3 who might be falling short on the 60 percent floor based on
4 what they were doing academically, particularly with national
5 recognition. So, I am writing major textbooks or, number two
6 particularly is serving on NIH study sections.

7 Now, in aggregate, these eight criteria each have a
8 contribution of only up to 10 percent and each one has about a
9 potential for 1 to 2 percent credit. So, if someone, for
10 example, is at 58 percent instead of 60 but they're on a
11 national study section, they get two points. But the most that
12 you will ever get from these national reputation contributions
13 is 10 percent.

14 THE COURT: 10 percent for each of --

15 THE WITNESS: No, no, I apologize. In total no more
16 than 10 percent and maybe 1 to 2 percent. So each one of these
17 only carries a weight of 1 to 2 percent and so, therefore, if
18 you have only 1, you get 2, 1 to 2 points towards 60 and then
19 you can do the addition but maximizing at 10 percent.

20 MS. TSE: Your Honor, Exhibit 39 is a biographical
21 sketch which is a short form of an individual's CV and it is a
22 form that is provided by the NIH for grant application use.
23 Exhibit 39 is Dr. Tse's bio sketch as it was submitted with the
24 Reibman grant application. May we approach and show this to
25 Dr. Abramson?

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1 MR. CERASIA: It was admitted through Dr. Blaser on
2 Monday.

3 MS. TSE: Oh, I'm sorry.

4 MR. CERASIA: At least that's what my records show.

5 THE COURT: I don't believe that my records show that
6 39 was admitted into evidence on Monday. Let me check
7 yesterday. (pause)

8 No. So, Exhibit 39 has not yet been admitted into
9 evidence.

10 Mr. Cerasia, do you have an objection?

11 MR. CERASIA: I don't have an objection at this point.

12 THE COURT: I'm sorry?

13 MR. CERASIA: I'm sorry. I don't have an objection.

14 THE COURT: So, Plaintiff's Exhibit 39 is received in
15 evidence.

16 (Plaintiff's Exhibit 39 received in evidence)

17 MS. TSE: May we approach, your Honor?

18 THE COURT: You may.

19 BY MS. TSE:

20 Q. Dr. Abramson, Exhibit 39 is a bio sketch that was submitted
21 in response to an RFA together with Dr. Reibman. Dr. Tse was a
22 co-investigator and listed under PDPI -- program director
23 principal investigator -- on the application. If you want to
24 review the application, the Bates pages were submitted into
25 evidence as Exhibit 11. Just let me know whether you want to

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1 look at that.

2 A. All I can say from this is that you were an investigator.
3 Whether you were co-PD and true PI with Dr. Reibman, I can't
4 tell from this document.

5 Q. All right, then we will -- may we have a moment to bring up
6 Exhibit 11 for Dr. Abramson?

7 THE COURT: Yes, certainly.

8 Dr. Tse, do you wish to refer Dr. Abramson to a
9 particular part of 11?

10 MS. TSE: No. There is only two pages and the
11 pertinent information is boxed in blue.

12 THE COURT: On page 2?

13 MS. TSE: Both pages.

14 THE WITNESS: Okay. I see the information.

15 BY MS. TSE:

16 Q. The date of submission and the funding opportunity, and on
17 page 2, Dr. Tse, and below that project role PDPI which is
18 program director, program investigator.

19 A. Yes, I see that.

20 Q. All right. We will come back to that.

21 Going back to Dr. Tse's bio sketch, I would like to
22 bring your attention to the second page which is page 16 of the
23 grant application as indicated in the lower right, the boxed
24 part.

25 A. Uh-huh.

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1 Q. Does it show that Dr. Tse sat on as many as three review
2 panels?

3 A. It does, but the reference in the extra -- in the
4 extraordinary academic contributions is interpreted as standing
5 members of a study section. I am looking at this, these are ad
6 hoc study section committee, correct? So study section meets
7 three times a year and you are appointed for a five-year
8 period. That is different from what is shown here.

9 Q. But the fact that Dr. Tse was invited to sit on three
10 review panels, is that the track record of a failing scientist?

11 THE COURT: It is now 1:45. Dr. Tse, how much more do
12 you have for Dr. Abramson?

13 MS. TSE: No more than 15, 20 minutes? Or I will try
14 to limit it.

15 THE COURT: Yes. I will give you 10.

16 MS. TSE: Can Dr. Abramson answer my question?

17 THE COURT: No. The objection is sustained.

18 MS. TSE: May I know on what ground so I won't venture
19 there again?

20 THE COURT: It is argumentative.

21 BY MS. TSE:

22 Q. Dr. Abramson, as the Vice Dean of the school, after he
23 stated --

24 THE COURT: Listen. I do not want a speech. I have
25 ruled. Move on or you don't get 10 more minutes.

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1 MS. TSE: Very well.

2 BY MS. TSE:

3 Q. So, can you confirm for the Court that Dr. Tse had either
4 independently or in collaboration with other investigators
5 obtained extramural funding from the bio sketch?

6 A. I see the --

7 THE COURT: What part of the bio sketch, Dr. Tse?

8 Q. That would be under which is a mandate of supporting
9 grants, Section C, research support.

10 A. So, I see, once again, as part of P 30, I see grant support
11 which appears to me to be not part of a PI, correct me if I am
12 wrong, a project within a larger grant.

13 MS. TSE: May I, your Honor, approach with the bio
14 sketch of the individual to which the box area was reassigned?

15 THE COURT: No. I'm not going to have a comparison of
16 who replaced you and have the witness made a choice as to who
17 is better. That is not where you are going and now you are
18 down to seven minutes.

19 MS. TSE: In that case I will need the seven minutes.
20 Exhibit 42, may we approach with that? It is a history of
21 Dr. Tse's NIH funding.

22 THE COURT: You may.

23 Q. Dr. Abramson, I believe Exhibit 42 shows that prior to her
24 assuming the responsibility --

25 THE COURT: Do you have any objection to this?

G6F5tse3

Abramson - direct

1 MR. CERASIA: You know, I would like her to lay a
2 foundation by this, Judge, but I am not certain it was produced
3 in discovery. I don't know that the witness is familiar with
4 it but I am not.

5 THE COURT: Yes.

6 MS. TSE: The document was produced from a publicly
7 accessible website known as E-reports that the NIH has made
8 available. It was not produced or was produced in discovery.
9 I cannot, off the top of my head confirm that, but it was
10 definitely included in the list of exhibits in the JPTS.

11 THE COURT: Mr. Cerasia, do you have any reason to
12 object?

13 MR. CERASIA: No, and that was the stated basis of our
14 objection. I'm not trying to delay this, your Honor. I want
15 to make sure the witness knows what this is because I don't.

16 THE WITNESS: I am familiar with this website.

17 THE COURT: All right, then. 42 received in evidence.

18 MS. TSE: Thank you, your Honor.

19 (Plaintiff's Exhibit 42 received in evidence)

20 BY MS. TSE:

21 Q. Dr. Abramson, does Exhibit 42 show that prior to assuming
22 the responsibilities as the PI for the CFAR flow cytometry core
23 during her early years at NYU, Dr. Tse was able to apply for
24 and receive NIH funding?

25 MR. CERASIA: I'm going to object on the grounds that

G6F5tse3

Abramson - direct

1 I think it is irrelevant. This deals with funding from 1997
2 through 2009. It is all prior funding from the time in the
3 core. And to the extent that she is trying to bring it up
4 again to show this argument about her competence, I think based
5 on your Honor's prior rulings, it should be excluded.

6 MS. TSE: The witness has raised the issue in his
7 testimony that Dr. Tse was purportedly removed because she was
8 underperforming --

9 THE COURT: First of all, that is not what this
10 witness said, so if that's where this is going I am going to
11 strike Plaintiff's Exhibit 42 from being admitted. It is no
12 longer admitted.

13 Now, you have three minutes. Is there anything that
14 you would like to use that would be helpful to your position
15 that has not been excluded by the Court?

16 MS. TSE: Yes. I have one last question or two last
17 questions and this pertains to Dr. Abramson's expert as a
18 position and my question is, would Dr. Tse's osteoarthritis
19 have improved between March 2010 -- referring to the letter
20 submitted by Dr. Solitar -- on April 2011?

21 MR. CERASIA: Objection.

22 THE WITNESS: Where -- I'm sorry. Go ahead.

23 THE COURT: I will allow this.

24 THE WITNESS: Would it have improved it? Is that the
25 question?

G6F5tse3

Abramson - direct

1 BY MS. TSE:

2 Q. Yes.

3 A. So, the answer is everyone is different, frankly, and
4 osteoarthritis, interestingly, and I can show you my own
5 example with my hand, can be bad and then it can get very --
6 without symptoms for a protracted period of time. So, it's
7 each individual is different and there is no way, without my
8 seeing a person during that time frame, whether they would stay
9 the same and get better or get worse. There is no way of
10 knowing.

11 Q. Dr. Tse articulated to Dr. Blaser in May 2010, and if we
12 need to we can approach and --

13 THE COURT: What is the question, Dr. Tse?

14 Q. Okay. The question is, Dr. Tse articulated to Dr. Blaser
15 that because of the osteoarthritis she was incapable of doing
16 lab work herself and generate preliminary data towards new
17 grant applications. She did not have a lab with staff. Now,
18 my questions is, you have just said that it varies with the
19 individual whether the osteoarthritis would have progressed
20 between March 2010 and April 2011 and my second question --

21 THE COURT: No, no. Let's get an answer -- what was
22 the first question?

23 MS. TSE: No, he did, he answered the first question
24 already, whether --

25 THE COURT: What is the second -- don't link these

G6F5tse3

Abramson - direct

1 things together. This is making it much more difficult. What
2 is your last question?

3 BY MS. TSE:

4 Q. The last question, if I am not going to compound it would
5 be actually two --

6 THE COURT: Well, choose the better one.

7 Q. As I have introduced myself, I am Doris Tse and I am asking
8 you to give an opinion, as an expert witness given that you're
9 internationally recognized as a rheumatologist, can you
10 honestly say --

11 THE COURT: No, no. Strike the honestly. Can you
12 say, as an expert.

13 Q. Can you say, as an expert, that I appear totally disabled
14 today?

15 A. Well, I can only see you from where I sit. I see nothing
16 that is disabled.

17 Q. Okay. There?

18 A. Perfect.

19 Q. And finger splint for the hand, osteoarthritis.

20 I have no more questions, your Honor?

21 THE COURT: All right, Dr. Tse. Thank you.

22 Now, it is well past lunchtime. Would people like to
23 take a break for lunch or -- I understand we have really
24 imposed on Dr. Abramson's time.

25 Mr. Cerasia, I don't want to put you at a disadvantage

G6F5tse3

Abramson - direct

1 but are you willing to take a small lunch break and come back
2 and ask your questions or do you wish to just proceed through?

3 MR. CERASIA: Your Honor, at this point I would like
4 to defer to Dr. Abramson because it is his schedule. I will
5 need to take a snack break because I have medical issues that
6 require me to eat, but I think for 15, 20 minutes I'm okay but
7 I am really pushing it. I have a snack here.

8 THE COURT: You know what? I am sorry, Dr. Abramson,
9 may we -- does your schedule permit us, having abused it so
10 far, does it permit us to take a half hour lunch break and then
11 come back?

12 THE WITNESS: I have a patient at 3:00.

13 THE COURT: So let me just ask you, I don't want
14 you --

15 MR. CERASIA: Judge, I can go forward.

16 THE COURT: No. You see --

17 THE WITNESS: Take a 15 minute break?

18 THE COURT: I am not taking responsibility.

19 MR. CERASIA: No, no.

20 THE COURT: Mr. Cerasia, so many issues have come up
21 during the course of this trial. It deals with someone's
22 health, we have accommodated people. I don't want to endanger
23 anybody. 15 minutes would do for you?

24 MR. CERASIA: It won't endanger me, your Honor.

25 THE COURT: No, a 15-minute break.

G6F5tse3

Abramson - direct

1 MR. CERASIA: A five-minute break would be more than
2 enough for me right now.

3 THE WITNESS: That's fine.

4 THE COURT: All right. Five minutes.

5 MR. CERASIA: Thank you.

6 THE WITNESS: Thank you.

7 (Luncheon recess)

8 (Continued on next page)

G6F3TSE4

Abramson - cross

1 (In open court)

2 THE COURT: Please be seated. Mr. Cerasia, are we
3 ready to proceed?

4 MR. CERASIA: I am, thank you, your Honor.

5 THE COURT: Please do.

6 CROSS-EXAMINATION

7 BY MR. CERASIA:

8 Q. Dr. Abramson, when Dr. Blaser was the chair of the
9 department of medicine, let's say between 2010 and 2011, do you
10 know what his policy was in that department as to the
11 percentage of funding that was needed for a non-tenure research
12 faculty member to maintain employment?

13 A. I can't speak to what Marty's policy was specifically,
14 except I knew that he, like other chairs, expected non-tenured
15 faculty members to cover 100 percent of their salary. And the
16 only exceptions would be if other scientists agreed to cover
17 them because they were collaborating or if he as chairperson
18 was working with a non-tenured faculty member who was important
19 to Marty's lab work, then the funding would come out of Marty's
20 funds, and that's not uncommon.

21 All of those, that whole spectrum of the person has to
22 cover all of his salary or they have a half-time job doing
23 administrative role, or the chair covers them, the whole
24 spectrum exists, depending on the role of the non-tenured
25 faculty in the department.

G6F3TSE4

Abramson - cross

1 Q. Do principal investigators, primarily tenured faculty
2 members, do they get to pick and choose who they want to
3 collaborate with on the non-tenured track?

4 A. Yes. By definition, sure.

5 THE COURT: I don't understand that question,
6 Mr. Cerasia.

7 Q. You as a principal investigator of a research program, do
8 you get to pick your team that you want to have on a grant
9 proposal?

10 A. Yes, you choose the people that you want to work with.
11 It's -- oftentimes those are your collaborators for an extended
12 period of time.

13 Q. In general, as a principal investigator, how do you pick
14 the people who are on your team? Is it based on experience --

15 THE COURT: Please, you are an attorney. Let's not
16 try and cut corners by you testifying. Just ask the open ended
17 question, please.

18 Q. How is it that you go about picking the people on your
19 team?

20 A. You look for people with expertise in the area that you're
21 interested in. And then you get, like any other position, you
22 work to see what their backgrounds are.

23 Q. On direct examination, you had testified about the process
24 in general that a researcher would go through in order to
25 submit a grant proposal, and you talked about an idea. So can

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Abramson - cross

1 you tell us just in a very general sense what that process is
2 starting with the idea until like the day you submit the grant
3 proposal?

4 A. Well, you have a question. You start with an idea which is
5 fundamentally a question. And the question is if I -- is there
6 a particular gene that's causing a person with an arthritis to
7 get worse. And so then you frame -- you frame a grant, which
8 says what several things would I have to test and do in order
9 to answer that question. So you set a hypothesis. You say, in
10 order to answer that question, I'm going to look at this gene
11 is going to cause that.

12 Then you write a 25 or now a 12-page document that
13 takes you several months. It is a very arduous process. And
14 you write a grant, you involve other people with expertise that
15 add value to your grant, and then you submit it. And you write
16 your approach, how you're going to do it, what tests are you
17 going to do, how are you going to analyze it, what are the
18 statistics, and you submit it.

19 The process is arduous. So as we speak, I have a
20 grant that study section I submitted in December or February.
21 And that grant took me six months to write. So these are not
22 easily done. And then the data, right now it is only a
23 10 percent chance that that grant will get funded, in which
24 case you have to go back and get more data and resubmit it.

25 So it's not, it is a -- it takes a lot of -- robust

G6F3TSE4

Abramson - cross

1 data. You can't just say I have a great idea and I am going to
2 write it up and get a grant. There is a lot that goes into it.

3 Q. After you have the idea but before the grant, do you use
4 the laboratory to conduct some kind of experiments?

5 A. You always need preliminary data. And your data has to
6 show that the idea that you have, there's some semblance of an
7 indication that that's the right direction to go or that you
8 can answer your question.

9 Q. Is there ever an occasion where a research faculty member
10 would go into the laboratory without a specific idea or
11 hypothesis?

12 A. In anticipation of writing a grant?

13 Q. Right.

14 A. Can't do it. I mean, the grant, you have to write an
15 introduction of why this is an important area and what adds --
16 what question are you going to answer and what approach are you
17 going to take and what preliminary data that you have to
18 justify that you can do it. And then you have enough expertise
19 on your end to answer your question.

20 Q. Does a researcher always need new preliminary data or are
21 there times that they use past preliminary data that they might
22 have used in the past six months, year, whatever the time
23 period may be?

24 A. Usually the preliminary data can be anywhere up to a year
25 in the past, typically. Because, remember, it takes months to

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Abramson - cross

1 write these grants.

2 Q. Can you please look at, it is in front of you, Plaintiff's
3 Exhibit 10. I'm going to ask you to turn to the page which has
4 the Bates number in the bottom corner of 3086. Specifically,
5 it would be policy BC number five entitled "safe harbor." Do
6 you see that?

7 A. I do.

8 Q. As someone who participated in the drafting of that
9 document, what is a safe harbor provision?

10 A. So this was an attempt to address the difficulty, the
11 cycling the people have in the course of their grants. You
12 might go without a grant for a year. And we didn't want to
13 have salaries lowered or have consequences for someone who is
14 in a sustained period of funding. So therefore you would not
15 have the initiation of salary reduction.

16 Again, as we spoke before, this applies not -- on this
17 point, that this applies, predominantly this applies to tenured
18 faculty members. What trumps this paragraph in a non-tenured
19 situation, if there are no moneys to support somebody, even if
20 they've had several years of funding up to the safe harbor
21 baseline, if there is no moneys available to the division, to
22 the director, that director, because the non-tenured faculty is
23 at will, will give three months' notice, if necessary. We try
24 to maintain people though.

25 Q. So, does this provision relate, as it says, only to a

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Abramson - cross

1 protection from salary or does it relate to a protection for
2 continued employment?

3 A. This only has to do with salary. And remember, again, this
4 was conceived of for tenure. So these people are by definition
5 continually employed. The question is can you lower their
6 salaries with a tenured situation.

7 THE COURT: Dr. Abramson, is there anywhere in this
8 document that indicates that this applies only to tenured
9 faculty?

10 THE WITNESS: Yeah, in this document, as we said
11 earlier, there is this clause at the discretion of the chair
12 salaries -- the REF, I forget where it was. But, we allowed
13 chair discretion for non-tenured faculty.

14 THE COURT: My problem is that you and others have
15 testified about tenured versus non-tenured faculty. But to
16 someone who is just reading this for the first time, it is not
17 clear at all what applies to only tenured faculty and what
18 applies only to non-tenured or what applies to both.

19 So I'm asking if somebody picks this up or it is sent
20 to them, how are they supposed to know what applies to them and
21 what doesn't?

22 THE WITNESS: Right. So I think it was sort in
23 answer -- so the way the school and the departments and the
24 majority of faculty know this, but it doesn't directly answer
25 your question.

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Abramson - cross

1 What trumps this document, is the fact that
2 non-tenured faculty don't have a guarantee of sustained
3 funding. Meaning that you could let a person go with proper
4 notice, with three months. So that's -- that's basically based
5 on the documents, the bylaws of the school, that non-tenured
6 faculty -- which is why we send these letters out every spring
7 that if you have a non-tenured faculty member, give them three
8 months' notice.

9 THE COURT: So then this doesn't apply to non-tenured
10 people?

11 THE WITNESS: This document does not apply to
12 non-tenured faculty.

13 THE COURT: Then if it were sent to a non-tenured
14 person, would they not have an expectation that it did apply to
15 them?

16 THE WITNESS: If they weren't aware of the other
17 policy, which is that most -- the majority of non-tenured
18 faculty members know that they serve in this notion of an
19 annual reappointment. And they are not guaranteed for salaries
20 for two years, as an example here.

21 THE COURT: It leaves a lot to chance. Maybe they
22 need to go to law school before they go to medical school or to
23 get their graduate degree in science.

24 THE WITNESS: The only difference is, the reason that
25 tenure is so coveted at all schools, is people know that you're

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Abramson - cross

1 not subject to being released after a year or less in fact.
2 That is embedded in the whole notion of getting tenure, versus
3 not having tenure. At NYU, the faculty at NYU know they get
4 reappointed each year in September. In these years, there used
5 to be an annual letter, as I recall it, that went from the
6 provost of the university to every faculty member that says you
7 have been reappointed for this coming academic year. And
8 therefore, you needed to be reappointed in order to stay on in
9 employ.

10 If you're tenured, that letter didn't mean anything
11 because you were hired in perpetuity, as it were.

12 So everybody knew, so it was -- it would be fair to
13 say that if a non-tenured person knew they had annual -- people
14 who were not tenured knew, certainly should have known, that
15 they had an annual letter from the university saying
16 congratulations, you are hired again for the coming year. And
17 that they were not guaranteed annual reappointment.

18 In fact, the reason that letter goes out in the spring
19 is we try as best we can to give at least three months' notice,
20 and where possible, synchronize it with the academic year of
21 appointment, September 1st.

22 That was the baseline, in my view, community knowledge
23 and standard before we came along with this document. And this
24 document was then intended primarily for tenured faculty.

25 Q. Dr. Abramson --

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Abramson - cross

1 MR. CERASIA: Are you done, your Honor?

2 THE COURT: Yes, I am. Thank you, Mr. Cerasia.

3 Q. What is the faculty senators council?

4 A. So, the governance, there is a faculty council at the
5 medical school, which has about 25 representatives from each of
6 the departments in the school. And that's separate from NYU
7 the Washington Square, the university has a faculty senate.
8 And there is a small group or larger group, in fact, of
9 senators who sit on the senators council. So processes are
10 reviewed by each of these bodies, these faculty bodies.

11 Q. Are you aware of the faculty senators council in the school
12 of medicine ever raising any concerns that sometimes documents
13 aren't clear as to whether there are tenured or non-tenured --
14 or whether or not they're applicable to tenured or non-tenured
15 employees?

16 A. It hasn't come up at the faculty council to my knowledge,
17 per se, until recently. So there is a big discussion at the
18 university because of the adjunct so-called contract faculty.
19 And what the rights are of contract faculty at New York
20 University. So, only in the past year have been a movement to
21 create protection for contract adjunctive faculty, and this
22 year for the first time they formed a senate, they became part
23 of the faculty senate council. And at the medical school we've
24 had tenured and non-tenured faculty members represented on the
25 faculty council for years. I'm not sure if that answers --

G6F3TSE4

Abramson - cross

1 MR. CERASIA: May I approach, your Honor?

2 THE COURT: Certainly.

3 Q. I am going to show you what Dr. Tse identified as
4 Plaintiff's Trial Exhibit 44.

5 MR. CERASIA: May I stay up here, your Honor? I don't
6 have another copy of it.

7 THE COURT: Yes.

8 Q. Have you seen that before?

9 A. I may have, but I honestly don't recall specifics on it.
10 This is 2008, right?

11 Q. Right.

12 A. Okay.

13 Q. So you don't know if you've seen it?

14 A. I don't recall having specifically seen this document.

15 Q. Okay. I'll take it back then. Thanks.

16 You were asked some questions on direct examination
17 that dealt with the term "reasonable accommodation." Do you
18 remember those questions?

19 A. Hmm-hmm, yes.

20 Q. Within the school of medicine, are you the person who has
21 any responsibility for providing for reasonable accommodation
22 of those employees who are deemed disabled under the employment
23 laws?

24 A. No, that's not the kind of situation that comes to my
25 office, which is more grievances of faculty, grievances related

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Abramson - cross

1 to promotion for example. Disability typically goes through
2 the HR department.

3 Q. Thank you. I think you have in front of you, too, if you
4 look at Plaintiff's Exhibit 13.

5 A. Okay.

6 Q. Which would be a June 8, 2007, memorandum that you sent to
7 department chairs?

8 A. Hmm-hmm. Yes.

9 Q. A couple of minutes ago you testified to a three-month
10 notice that is usually given to non-tenured faculty members to
11 let them know that their employment is going to end?

12 A. Hmm-hmm.

13 Q. Is that the document that you're referring to?

14 A. Yes. And this is an important document because it does
15 refer to the bylaws regarding non-tenured faculty in the
16 handbook. And so we -- our understanding, our approach has
17 been to give a minimum of three months, simply acting in good
18 faith with people. There's no specific amount. We try to
19 coordinate that with September 1st, but our lawyers don't feel
20 that we are obliged to do so.

21 MR. CERASIA: Your Honor, may I have a minute because
22 I think I'm finished.

23 THE COURT: Certainly.

24 MR. CERASIA: Thank you. I don't have any other
25 questions at this time, thank you.

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Abramson - redirect

1 THE COURT: Thank you, Mr. Cerasia.

2 Dr. Tse, do you have any questions that are limited to
3 what Dr. Abramson just testified about when he was examined by
4 Mr. Cerasia?

5 MS. TSE: Yes, I do.

6 THE COURT: Okay.

7 REDIRECT EXAMINATION

8 BY MS. TSE:

9 Q. First of all, Dr. Blaser's expectations of 100 percent REF
10 for research faculty in his department. And should Dr. Blaser
11 have informed the research faculty members exactly that that's
12 what was expected of them?

13 A. I don't know that he's under any school-wide obligation to
14 have that specific discussion.

15 Q. How were those research faculty members expected to know
16 what the department chair considers appropriate job
17 performance?

18 A. Well, you know, I think when you look at even this
19 document --

20 THE COURT: When you say "this document."

21 THE WITNESS: I apologize. The expectations for
22 funding for research faculty.

23 A. If someone is bringing in research, and coming close to the
24 60 percent or more, it's one kind of discussion with a faculty
25 member. If someone is not getting any grants, and only has

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Abramson - redirect

1 5 percent funding, it really puts a lot of stress on the
2 department chairs to know what to do. And that's when these
3 conversations often happen. But not abruptly. I'm sure in
4 this case there were conversations between yourself and
5 Dr. Blaser about how to find collaborations, how to increase
6 the extramural funding via collaboration with other scientists.

7 So, you know, I think it's really when things get down
8 to that kind of level that it becomes a crisis, both for the
9 individual and the department, frankly.

10 Q. You just stated and very, very clearly, as to what the
11 grant application process was about. First of all, it would
12 take several months, it's arduous, and it's robust and
13 preliminary. Dr. Tse found herself losing 65 percent of her
14 REF. So according to your testimony, would it take at least
15 one year, if not more, for her to replace that?

16 A. With NIH funding that's possibly so. Depends on whether
17 one is collaborating with other scientists, that could
18 accelerate that. So the way that most people would try and do
19 it while they're trying to get their own data, is to bring
20 their expertise to collaborators, and have 15, 20 percent on
21 other people's grants, multiple grants, to get up towards the
22 60-plus percent.

23 Q. I'm referring you back to Exhibit 11, I don't know whether
24 you still have it in front of you.

25 A. I do.

G6F3TSE4

Abramson - redirect

1 Q. That's the Reibman-Tse collaborative in response to the
2 RFA. Can you explain to the Court what an RFA is.

3 A. It's a request for applications by the NIH soliciting
4 specific areas of study.

5 Q. And chances of funding are a little bit better than
6 10 percent compared to other NIH applications?

7 A. It depends on the NIH institute. It varies.

8 Q. Section 11, the descriptive title of the project. "Injured
9 vaginal mucosa and D.C. promotion of H.I.V. transmission."

10 Do you know Dr. Reibman as someone who works on
11 vaginal mucosa or H.I.V. transmission?

12 A. Dr. Reibman works on epithelial cells, which are another
13 kind of mucosal tissue.

14 Q. Is this the sort of collaboration that you were referring
15 to?

16 A. Well, it could be. I mean, my question, obviously, this is
17 an RFA a while back. Was it funded?

18 Q. The RFA was dated July 2010.

19 A. Hmm-hmm. Did it get funded?

20 Q. It was not funded, and the investigators were not notified
21 until November 2010. Besides the one year that you just stated
22 with a lot of arduous effort and robust preliminary data that
23 one is expected to put together an application, particularly
24 one for the NIH, let's say Dr. Tse was not removed as the flow
25 cytometry core director. Would she find out in a month or less

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Abramson - redirect

1 that she would lose her funding from the NIH?

2 And just to make it clear to the Court. If you have
3 an ongoing funded project, and you apply to renew it, and the
4 NIH said "no, not approved," what is the time period between
5 getting the notice that you're going to lose your grant, you're
6 going to lose your extramural support, to the actual time that
7 the grant itself would run out? It's not a month before the
8 grant would run out.

9 A. It really depends, frankly, when you submit the grant. So
10 I'm not sure exactly what the question is, but typically if you
11 put a grant in and you find out that it's not funded, in a
12 funding range, you'll find that out within a few weeks of the
13 study section. Then you have the opportunity about five months
14 later to resubmit the grant.

15 I think what's important to note since you brought
16 this up, putting in a grant is different from getting a grant
17 funded. Being a primary investigator, PD, PI in a grant that's
18 not funded doesn't mean one is a funded investigator or
19 fundable investigator.

20 So I think one has to look at this kind of document in
21 this context and say, the grant wasn't funded. And why does
22 this document then say that there is a qualification to get a
23 funded grant.

24 Q. What I was more or less trying to establish is --

25 THE COURT: No, no. Put a direct question to

G6F3TSE4

Abramson - redirect

1 Dr. Abramson based on his last answer, if that's what you want
2 to do. But don't say what you're trying to establish.

3 Q. In the case of the Reibman-Tse application, it was
4 submitted July 2010. It was a new application, rather than
5 what is known as a renewal. You find out essentially four
6 months later and RFAs -- would you confirm for the Court that
7 one of the features of an RFA is what they call a fast track in
8 terms of review and notification of award or no award?

9 A. Yes. An RFA is usually not resubmittable. They're a
10 one-time effort by the NIH to bring in applications and not
11 like typical R01s, you can't typically respond to the comments
12 and submit it again six months later.

13 Q. This particular RFA, in the RFA itself was resubmittable as
14 an R01. When would the next resubmission deadline be for when
15 you find out that the grant that you submitted is not funded?
16 We are looking at November 2010.

17 A. October, November, yeah.

18 Q. When can you put in a resubmission?

19 A. As I say, sometime -- it's either October or November.
20 Depending on the cycle.

21 Q. Yes. But you didn't find out until November. As a matter
22 of fact, you know, it was pretty much in the second half of
23 November that your grant did not get funded, and you need to
24 put in a reapplication and address the NIH reviewer critiques.
25 Do you remember off the top of your head perhaps what the next

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Abramson - redirect

1 reapplication cycle would be?

2 A. Typically February. Typically February.

3 Q. Since I have the document here as an exhibit, it's actually
4 for reapplication March 2011.

5 A. Hmm-hmm.

6 Q. Dr. Blaser notified Dr. Tse January 4, 2011, that her
7 appointment would be terminated. And after receipt of that
8 notification, she would not have be able to do a resubmission.
9 Is that right?

10 MR. CERASIA: Objection. I don't know if she is
11 saying that's what Blaser told her or she's asking whether or
12 not after she gets notice she can resubmit something.

13 THE COURT: Yes.

14 MS. TSE: I will rephrase.

15 Q. Dr. Tse received a notice from Dr. Blaser January 4, 2011,
16 that her employment at NYU or appointment as a research faculty
17 member would be terminated April 4, 2011. Would she be able to
18 resubmit this grant with Dr. Blaser?

19 A. Well, the answer is no. But oftentimes chairs had to make
20 a decision of the likelihood of a grant getting funded. And if
21 there has been no funding previously on this kind of grant,
22 then I would ask was the grant funded depends on the grant's
23 score. Do you know what the score of the RFA was?

24 Q. I don't recall.

25 A. Was it scored?

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Abramson - redirect

1 Q. I don't recall.

2 A. Because sometimes putting in a grant doesn't mean that
3 you're close to ever getting that grant. So grants are funded
4 on a scale of one to 100. And anything above a 40 is sometimes
5 they're not even reviewed. So, that one has to -- frankly,
6 Dr. Blaser had the right to make any decision that he wanted.
7 But sometimes the decision is made based on the review of the
8 grant that one might like to put in.

9 So if the grant was poorly scored or not reviewed, a
10 judgment could be made that that grant was not going to do
11 better or get funded on a second cycle.

12 So again, I don't know how he was evaluating the
13 decision, but, we have sometimes made a decision that a grant,
14 just because you can submit it, is not worthwhile to resubmit.

15 Q. You mentioned application from non-NIH sources. Can you
16 explain to the Court why NIH sources would be preferable?

17 THE COURT: Wait. Was this on the examination by
18 Mr. Cerasia?

19 MS. TSE: Yes, yes, because it was mentioned that
20 there are other sources of funding. Like foundations and --

21 THE COURT: That was on your direct.

22 MS. TSE: Was it? All right. Then I won't ask the
23 question.

24 THE COURT: Do you have anything else?

25 Q. Do you recall off the top of your head pretty much from

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Abramson - redirect

1 your own funding experience when NIH will not renew a project,
2 do you get more than three months' notice?

3 A. The cycles are pretty much the same, to my knowledge. The
4 cycle's twice a year you can put grants in. If you don't do
5 well on one, you can come back six months later. And it
6 doesn't matter whether it was a non-renewal, non-competitive
7 renewal, or a new grant.

8 Q. Let's just say, take for example the CFAR grant. We
9 received notice December 2009 that it was not approved for full
10 funding. But, whatever funds that were awarded would not run
11 out until June 30, 2010. So in essence, you would know six
12 months ahead of time what you have to deal with. Is that
13 pretty typical?

14 A. CFAR grants are very different, so I can't say what's
15 typical for a CFAR grant.

16 Q. But, with an R01 is that timeline pretty much the same?

17 A. Repeat the timeline because I forgot.

18 THE COURT: Let me just ask where are you going with
19 this.

20 MS. TSE: I'm going with, essentially, the three
21 months' notice that Dr. Tse had from the time she was removed
22 as the core to termination of her funding from the core.
23 April, May, June. And it wasn't -- actually, it was not even
24 three months. All right. She was notified in March, and her
25 salary would be supported through May 31. So, essentially,

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Abramson - recross

1 that is at best three months' notice.

2 And my question to Dr. Blaser is would a principal
3 investigator have more notice that they're not going to be
4 funded. They're not going to have any extramural funding.

5 MR. CERASIA: Objection, your Honor. Because the
6 removal of her as the core director by CFAR was an internal NYU
7 decision. The NIH didn't do it and didn't say, hey, you're
8 being removed as core director, we're taking your funding away.
9 It was NYU who said you are being removed as core director, you
10 will not get the funding associated with core director from
11 April 1 to May 31. These are two different concepts.

12 THE COURT: I tend to agree with Mr. Cerasia. Do you
13 have anything else for Dr. Abramson?

14 MS. TSE: No.

15 THE COURT: Based on -- no? All right. Do you have
16 anything?

17 MR. CERASIA: I hope I have one question.

18 RECROSS EXAMINATION

19 BY MR. CERASIA:

20 Q. Dr. Abramson, on redirect you referred to a non-tenured
21 research faculty member who works in collaboration who gets
22 15 percent here and 15 percent there and then it all adds up to
23 above 60 percent. Do you remember that?

24 A. Hmm-hmm.

25 Q. Are you aware of any non-tenured research faculty member

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1 who is self-supporting of his or her salary in the sense that
2 they receive their own grant money from their own grants that
3 they submitted?

4 A. I'm not aware of anyone. That kind of person is typically
5 on a tenured track. I'm not aware of anyone in the medical
6 school doing basic science who is fully funded on their own
7 grants. Those folks who are not fully funded are collaborative
8 scientists and on other people's grants or running core
9 facilities or having some administrative role in the medical
10 school, teachers and whatnot. But no one meets that kind of --
11 100 percent funding.

12 MR. CERASIA: Thank you.

13 THE COURT: All right. Dr. Abramson, thank you so
14 much for your time. You are relieved.

15 THE WITNESS: Thank you very much.

16 (Witness excused)

17 THE COURT: Mr. Cerasia, the Court is in receipt of
18 your e-mail about the scheduling.

19 MR. CERASIA: Yes.

20 THE COURT: It is fine with the Court for us to
21 reconvene on Tuesday, the 21st, at 10 a.m. And based on what
22 is before the Court now, Dr. Tse will testify at that time.
23 Does anyone want to raise with the Court the possibility of
24 additional witnesses that you want to call?

25 MS. TSE: If there are no further issues or fact

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1 finding that is needed, regarding Tse's Unum applications, then
2 I do not feel the need to call additional witnesses. But if
3 Mr. Cerasia does, then given that Ms. Meagher cannot mobilize,
4 perhaps he can look into an assistant that she feels would be
5 able to answer the questions that may come up.

6 THE COURT: Well, did you yourself work with
7 Ms. Meagher about this?

8 MS. TSE: Oh, yes.

9 THE COURT: Well, then I don't know that anybody who
10 wasn't involved could be helpful. It would be really what they
11 were told by Ms. Meagher.

12 MS. TSE: What I'm referring to, your Honor, is the
13 Unum application portions itself. Not issues specific to
14 myself.

15 THE COURT: But that would be what would be relevant
16 for me.

17 MS. TSE: I did find and it was disclosed in discovery
18 a series of e-mails between myself and Ms. Meagher that would
19 be supportive evidence.

20 THE COURT: Are they already in evidence?

21 MS. TSE: No, no. It's after your Honor's
22 instructions to look for what we need. I found the e-mails and
23 I believe that they were submitted during discovery and also
24 during Tse's counsel Risman in her response to summary
25 judgment.

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1 THE COURT: All right, then, if you plan on admitting
2 them, please make sure that Mr. Cerasia has a copy of them in
3 advance so he knows what it is that you want to put in. And
4 that will hopefully resolve any issues about their
5 admissibility.

6 MS. TSE: Yes. Can I e-mail them both to the Court
7 and copy that to Mr. Cerasia, would that be appropriate?

8 THE COURT: Yes, that would be fine. Mr. Cerasia,
9 anything else?

10 MR. CERASIA: First of all, thank you, your Honor, for
11 the courtesy on the scheduling.

12 As to the LTD, it would be helpful if I could get
13 these documents by the end of the week. I don't really know
14 what the issues are that Dr. Tse believes to be in dispute with
15 respect to her LTD application. And if there is some way she
16 could tell me, maybe we could stipulate. Because I don't
17 really see much in the way of a dispute.

18 The applications were submitted, Unum conducted
19 whatever it does on its own, because it is a third party, and
20 then eventually issued a determination.

21 So, I really don't understand what's in dispute and
22 I -- Ms. Meagher, we've tried to contact, I believe she's now
23 out. She was out of the office yesterday and Mr. Dreisen
24 wasn't able to reach her. If there is not a dispute and it is
25 something we could stipulate to, that might be the most

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1 efficient way. But I don't know what the dispute is right now.

2 MS. TSE: Issues came up yesterday on the requirements
3 for six months salary continuation. And --

4 MR. CERASIA: That's not Unum. The six months salary
5 continuation is something she addressed under the faculty
6 handbook. So it would be really helpful because I think we
7 could be efficient about this if I knew what the issue was. If
8 it's something that she says Ms. Meagher did or didn't do, that
9 would be helpful to me.

10 MS. TSE: I was directed by Ms. Meagher -- I'm sorry.
11 I didn't mean to interrupt.

12 MR. CERASIA: What we have right now in the record is
13 Dr. Tse writes, has communications starting in I think it's
14 April with Mr. Odom who then refers her to Ms. Meagher on
15 May 13, which I don't remember the exhibit number, she wrote to
16 Dr. Blaser, and then on May 18 she submitted the Unum form.
17 About eight to 10 days later I think the employer, NYU,
18 submitted its form, and then the next thing we saw in evidence
19 was Unum issued its determination letter in the spring of 2011.
20 I just don't know what the dispute is. And if there is a way
21 that your Honor can ask Dr. Tse to narrow it with me over the
22 next two days, that would be great, and maybe we could come up
23 with some kind of stipulation, even under the e-mails that
24 she's referring to. I'm trying to fill a hole but I don't know
25 what the hole is.

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1 THE COURT: Exactly. And you are at a disadvantage
2 because you have not had the opportunity to hear Dr. Tse's
3 testimony, although quite frankly, I think that she has been
4 testifying since day one.

5 But what she puts in as her testimony, and you will
6 obviously have a chance to cross-examine her on that, Dr. Tse,
7 is there an issue that you see relating to the Unum
8 application?

9 MS. TSE: The issue was the request for long-term
10 disability which was very specific in my May 2010 letter to
11 Dr. Blaser. And in the same letter, I articulated to him why I
12 need to go on long-term disability because I cannot fulfill the
13 expectations of my job without assistants.

14 And I believe, and I think I'm right on that, that the
15 issue of long-term disability leave came up. And that it had
16 something to do with Unum. And I myself was very confused
17 about how that came up.

18 But, the e-mails which I can send by e-mail tonight to
19 both the Court and copy it at the same time to Mr. Cerasia,
20 simply a string of e-mails between myself and Ms. Meagher,
21 because I applied for long-term disability leave on her
22 instruction. Right. She was the one who said as part of the
23 process to receive long-term disability benefits under Unum,
24 you have to ask long-term disability leave from your department
25 chair and from there it will go on to Dr. Abramson, and from

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1 there, to the provost if they consider that necessary. And
2 that's how that came about.

3 Now, if your Honor considers that insignificant or
4 irrelevant, then there is no need for me to submit that into
5 evidence or even submit it for the Court's consideration.

6 THE COURT: I am not sure why it would be relevant
7 until you give me more information about is there an issue
8 about how you wound up applying? Was it some misunderstanding
9 about what you were applying for? I'm not exactly sure what
10 your position is in relation to this. Are you suggesting that
11 you were not aware that the disability was through Unum? I'm
12 not sure --

13 MS. TSE: No. The issue came up, I believe, with my
14 letter to Dr. Blaser. That I was asking him for long-term
15 disability leave.

16 THE COURT: I believe it was -- hold on one second.
17 You were asking for 65 percent.

18 MS. TSE: Long-term disability leave and, actually,
19 more than one issue came up. First, between Dr. Blaser and
20 Mr. Odom, they cannot confirm that Unum allows just 65 percent,
21 or rather, benefits pertaining only to 65 percent of the
22 insurer's income. I believe that I brought up, which was an
23 exhibit in evidence, that as long as the employee's salary
24 falls below 20 percent, your insurance benefits can kick in,
25 and Mr. Odom was unable to confirm that. And that was when we

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1 said --

2 THE COURT: Could you refer me specifically to that?
3 I remember seeing it, but I'm not sure which number it is.

4 MS. TSE: Sure. All right.

5 MR. CERASIA: 20, your Honor.

6 MS. TSE: Yes, that would be right.

7 MR. CERASIA: It is Unum's definition of disability.
8 It's on 20 and it's page four of the letter.

9 MS. TSE: NYU 000900.

10 MR. CERASIA: There is actually an "and" in there.

11 MS. TSE: An "and"?

12 MR. CERASIA: The definition of disability under the
13 Unum policy says: You are limited from performing the material
14 and substantial duties of your regular occupation due to your
15 sickness or injury and you have a 20 percent or more loss in
16 your index monthly earnings due to said sickness or injury.

17 THE COURT: So what was the question that you had?

18 MS. TSE: I asked on direct Mr. Odom to confirm that.
19 Pretty much you do not need to be totally disabled. You can
20 work up to 79 percent, not losing 79 percent of your salary and
21 still qualify for disability benefits. And his response was
22 that he's not clear on that. And the only person who would be
23 clear on that would be either Ms. Meagher or somebody she
24 considers under her supervision knowledgeable enough to provide
25 that answer. If your Honor does not consider that

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1 significant --

2 THE COURT: No, no, did you ever get an answer?

3 MS. TSE: No, I didn't get an answer from Mr. Odom.

4 Because --

5 THE COURT: I'm talking about -- forget the testimony.
6 I'm trying to get factually what happened here. Did you have a
7 discussion about the definition of disability with someone?

8 MS. TSE: With Ms. Meagher, because she was the one
9 who stepped me through the entire process.

10 THE COURT: Is that after or before you asked for
11 65 percent disability?

12 MS. TSE: At the same time.

13 THE COURT: All right. I can't tell what's relevant
14 and what's not relevant.

15 MR. CERASIA: I'm not asking for relevance or not
16 relevance. I just don't know what the issue is.

17 THE COURT: I think that is part of my problem. I am
18 trying to figure out from Dr. Tse what her issue is relating to
19 either disability benefits or to accommodation or what needs to
20 be explored here. I don't know.

21 MR. CERASIA: This is what I think happened. When she
22 was removed as the core director, there are e-mails which said
23 I'm losing 65 percent of my salary. So come June 1, I'm only
24 going to get paid 35 percent. That wasn't the reality. We
25 know she got paid 100 percent of her salary all the way

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1 through.

2 THE COURT: She didn't know that was going to happen
3 because no one bothered to tell her.

4 MR. CERASIA: But at some point in June she got her
5 paychecks at the very least, right, so she saw she got
6 100 percent. I just don't know if it's in issue. That's what
7 I'm saying. I don't know that we have to bring in a woman who
8 is having mobility problems and is out of work. If she has to
9 come in, she has to come in, we understand that. I just don't
10 know what the issue is. There doesn't seem to be a dispute to
11 me.

12 THE COURT: The issue --

13 MR. CERASIA: Because I don't understand.

14 THE COURT: I'm not sure how we go from accommodation
15 to disability. And I was hoping that someone could give
16 testimony or produce evidence that would show how the focus
17 shifted from accommodation to disability. And all I get so far
18 is that when they were talking with Dr. Tse, that disability
19 was raised as a possible, but I don't know how, when, I don't
20 know if there were specific accommodations discussions. It is
21 not clear.

22 But you know something, I am not ordering anybody to
23 produce any evidence that they are not feeling is necessary. I
24 have expressed concerns. If it is not a concern of the
25 parties, I will deal with the evidence that I have. All right?

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1 MS. TSE: The reason why the disability benefits came
2 up was because NYU argued in their JPTS statement that they
3 considered facilitating Tse's application for disability
4 benefits a form of reasonable accommodation. That is the
5 context in which the Unum disability benefits and the
6 application process, that was framed to address that.

7 And you know, I just stated very clearly, that there
8 is no need, first of all, for Ms. Meagher to come in because I
9 do have evidentiary material that was disclosed, Bate stamped,
10 submitted earlier in this case, that I at least would find
11 adequate. And because there is this string of e-mails, there
12 is really no need to drag Ms. Meagher in here and make her
13 pretty much reiterate what the e-mail clearly showed had
14 happened.

15 And the other thing is that if that is not adequate,
16 then there's no problem with asking Ms. Meagher to delegate
17 somebody who was under her supervision, Janice Bailey who
18 signed NYU's part of the application, if she is still working
19 at NYU, would be very suitable.

20 But for my part I am not insisting to bring
21 Ms. Meagher in.

22 THE COURT: I understand that. I'm not dealing with
23 whether Ms. Meagher has to come in or not. My question is,
24 what is the issue in terms of accommodation versus disability.

25 MS. TSE: If I may be allowed one minute, your Honor.

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1 THE COURT: Let Mr. Cerasia, who has been extremely
2 patient.

3 MR. CERASIA: The way Dr. Tse phrased this, I think,
4 your Honor, becomes a legal question and a legal issue. And
5 that is whether or not as part of an interactive process an
6 employer offers somebody to apply for disability is in and of
7 itself one form of reasonable accommodation.

8 THE COURT: All right.

9 MR. CERASIA: That become a legal issue and not a
10 factual issue. The second point is you may recall, your Honor,
11 Reggie Odom testified Ms. Meagher had nothing to do with the
12 interactive process of reasonable accommodation. She was just
13 an LTD person. If we're going to spend an hour or two hours on
14 LTD issues, I think the way Dr. Tse is framing it --

15 THE COURT: The question the Court has does it have
16 enough factual information to make that determination.

17 MR. CERASIA: I do understand that, Judge.

18 THE COURT: Okay. Let's just leave things open.

19 The next thing that happens on the 21st of June,
20 Dr. Tse, you will testify, you will be cross-examined. After
21 that, let's see where we are. Because I'm at a loss too. I
22 don't have all the factual information, because I'm missing the
23 testimony of Dr. Tse. I may not have a problem after I get
24 that. I may have more problems after I get that. But let's
25 not get there until after the testimony. All right?

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1 So you all should be in touch over the weekend in
2 terms of getting these additional e-mails in the event that
3 they are necessary or would be relevant. And I will look
4 forward to seeing you 10 a.m. Tuesday, the 21st of June.

5 MR. CERASIA: Thanks. I have one just procedural
6 issue. Is Dr. Tse when she testifies, will she be asking
7 herself questions? I want to understand how I will be able to
8 object. Or will she give a narrative.

9 THE COURT: She will give a narrative. She will give
10 a narrative. You will be able to cross-examine her on the
11 narrative. And then you will be able, after the fact, to say
12 whether or not you see -- there aren't going to be questions to
13 object to. It doesn't make sense for her to sit there and pose
14 a question and then answer it.

15 MR. CERASIA: I'm asking, Judge. I've seen it both
16 ways with pro ses. That's why I'm asking.

17 THE COURT: I think we would be better off with a
18 narrative and weaving in documents to support what her
19 narrative is, and then we'll see from there.

20 Well, I could ask Dr. Tse, how would you prefer to
21 proceed? Would you like to ask yourself questions and then
22 answer them?

23 MS. TSE: I have given it some thought. But I think
24 I'll be comfortable with whatever your Honor thinks would --

25 THE COURT: Then let me suggest this. Let's start out

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1 with the traditional questions to which an objection can be
2 raised and I have to rule and then you can answer or not. And
3 if this gets too cumbersome let's consider plan B.

4 MS. TSE: Okay.

5 THE COURT: All right?

6 MS. TSE: All right.

7 MR. CERASIA: Thank you.

8 MS. TSE: Once again, I have your permission to e-mail
9 the --

10 THE COURT: Additional documents, yes, yes.

11 MS. TSE: Thank you, your Honor.

12 MR. CERASIA: Your Honor, may I still store things
13 here until Tuesday or may I take them?

14 THE COURT: Sure. It will be fine.

15 MR. CERASIA: Thank you.

16 (Adjourned until June 21, 2016, at 10 a.m.)
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